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# JOHN MARSHALL

## LIFE, CHARACTER AND JUDICIAL SERVICES

As Portrayed in the Centenary and Memorial Addresses and Proceedings Throughout the United States on Marshall Day, 1901, and in the Classic Orations of Binney, Story, Phelps, Waite and Rawle

Compiled and Edited with an Introduction

By

JOHN F. DILLON

ILLUSTRATED WITH PORTRAITS AND FAC-SIMILE

IN THREE VOLUMES

VOLUME III

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CALLAGHAN & COMPANY  
1903

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INMAN PORTRAIT.



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## ILLUSTRATIONS, VOL. III.—EXPLANATORY NOTES

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### PORTRAIT OF MARSHALL - - *Frontispiece*

The frontispiece of the present volume is engraved by Gutekunst of Philadelphia, from what is known as the Inman portrait. The correspondence which resulted in the production of this portrait is given in the proceedings of the Bar Association of Philadelphia in 1831, contained in the Appendix to the present volume. Referring to this portrait Professor Thayer says: "It was at this period, in 1831 and 1832, that Inman's fine portrait of him, now hanging in the rooms of the Law Association of Philadelphia, was taken for the Bar of that city. A replica is on the walls of the State Library in Richmond, which Marshall himself bought for his only daughter. The portrait is regarded as the best that was ever taken of him in his later life. Certainly it best answers the description of him by an English traveler, who saw him in the spring of 1835, and said that 'the venerable dignity of his appearance would not suffer in comparison with that of the most respected and distinguished-looking peer in the British House of Lords.'" Of this portrait Mr. Justice Mitchell of the Supreme Court of Pennsylvania says: "There are many portraits of the Chief Justice, but most of them by inferior artists who failed wholly to catch or portray the spirit and character of the man. The standard and only satisfactory likeness is the one painted by Henry Inman for the Philadelphia Bar, which now hangs in the Library of the Law Association of this city. It gives us the mature man, with all the qualities that his contemporaries ascribe to him—the thin, rather small face, the broad brow with a mass of dark hair growing low down on it, the benignant half smile, and the keen but kindly black eyes that William Wirt said 'possess an irradiating spirit which proclaims the imperial powers of the mind within.'"

STATUE OF CHIEF JUSTICE MARSHALL, WASH-  
INGTON - - - - - *Page 327*

This statue, which is in bronze, was unveiled in front of the Capitol, May 10, 1884. It is inscribed "John Marshall, Chief Justice of the United States, erected by the Bar and the Congress of the United States, A. D. MDCCCLXXXIV." Its history is set forth in the addresses of Chief Justice Waite and Mr. Rawle, which are given in the Appendix. A most interesting feature of the statue is that it was the work of the eminent sculptor, William W. Story, son of Mr. Justice Story, the devoted friend and associate of Marshall for a quarter of a century.





# JOHN MARSHALL MEMORIAL.

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## STATE OF ARKANSAS.

Pursuant to a resolution of the American Bar Association, which was concurred in by the Bar Association of Arkansas, a committee was appointed at a meeting of the Bar of Little Rock to make proper preparations for the observance of February 4, 1901, as "John Marshall Day." The committee selected the Federal court room at Little Rock as the place for such observance, and chose as the orators of the occasion Hon. John McClure, to speak upon the life of the distinguished jurist, and Hon. U. M. Rose to speak upon his services. Invitations were extended to the judges of the Supreme Court of the State, the Honorables Henry G. Bunn, Chief Justice, Burrill B. Battle, Simon P. Hughes, Carroll D. Wood, and James E. Riddick, Associate Justices, to preside in conjunction with the Honorable Jacob Trieber, United States District Judge; the Chief Justice of the Supreme Court, Henry G. Bunn, to be the active presiding officer.

The attendance was very large. The Senate and House of Representatives at Little Rock, then in session, accepted the invitation of the committee and attended in a body. There was also present a large concourse of judges, lawyers and citizens, including many ladies.

The presiding officer in opening the meeting said:

**Address of Henry G. Bunn.**

We have met together on this, a day to be observed throughout the United States, to celebrate, in the appointed way, the one hundredth anniversary of the accession of John Marshall as Chief Justice of the United States. People in nearly all the other walks of life have been in the habit of selecting and canonizing the most deserving of their dead, and now for the first time the lawyers have bethought themselves to do the same thing, and by common consent have named this great man as worthy of universal acclaim.

Chief Justice Marshall, after having passed through the soldier's and statesman's experience, was placed at the head of the judiciary of the United States just one hundred years ago. The Supreme Court, until then, had little promise of becoming a very important factor in the development of this young Republic, but this was all changed by the subject of these memorial services. Except in cases growing out of controversies between individuals and of international law, the Chief Justice and his associates had little or no help from precedents as judges now have. This was a new government — none like it had appeared in all the world. He and his associates in most matters pertaining to the workings of the government moved in new paths and with original ideas. With an integrity and an ability unsurpassed in the world's history, this man, in a long judicial career, did his duty so well as to command universal respect and praise. It is therefore the befitting thing to do, as we have met to do, to commemorate his virtues as one of the nation's greatest men.

Senator James K. Jones, who was unable to be present, sent a letter to the committee in charge of the celebra-



tion, which was read to the audience; there was also read a telegram from Adolph Moses, Chairman of the Associated Committees of Illinois, sending greetings of Illinois to Arkansas.

And these proceedings having been completed, the orators of the day were introduced, and delivered the orations which follow.

The address of Mr. McClure deals with the life of Marshall, in accordance with the request of the Bar. Want of space compels the editor to omit biographical details concerning Marshall's private and public life prior to his accession to the Bench; but so much of the address as relates to his judicial career is given in full.

#### **Address of John McClure.**

On the reorganization of the cabinet of Mr. Adams, Marshall was offered the position of Secretary of War, and this he declined. Mr. Pickering was later removed from the position of Secretary of State and Marshall was tendered this position, and he accepted the same. This position he held until he was appointed Chief Justice, which was on the 31st of January, 1801.

When the Presidential election in 1800 resulted in transferring the choice between Jefferson and Burr to the House of Representatives, Marshall's inclination was to throw such influence as he had in favor of Burr. While he was debating the matter in his own mind, Hamilton wrote him telling him what kind of a man Burr was. In response to Hamilton Marshall wrote: "To Mr. Jefferson, whose political character is better known than that of Mr. Burr, I have felt almost insuperable objections. His foreign prejudices seem to me to totally unfit him for the chief magistracy. Your representations of Mr. Burr, with whom I am entirely unacquainted, show that

from him still greater danger than from Mr. Jefferson may be apprehended. Such a man as you describe is more to be feared, and may do more immediate if not greater mischief. Believing that you know him well and are impartial, my preference would certainly not be for him; but I can take no part in the business. I cannot bring myself to aid Mr. Jefferson." Without the aid of Marshall Mr. Jefferson was elected.

Between Marshall and Jefferson two different theories existed as to the nature and powers of the government created by the Constitution of the United States. Jefferson contended that the government formed by the Constitution was a compact; that a State, if it did not like the legislation of Congress, could withdraw from the compact at its pleasure; that the States, being distinct sovereignties, had the right, each for itself, to determine its course of action, and that no tribunal was created by the Constitution to decide such a controversy in case of dispute. The theory of Marshall was that the Constitution created the people of the United States into a Nation; that if disputes arose affecting the life or property of its citizens, or as to the power conferred by the Constitution upon the executive, legislative or judicial departments, it was for the proper tribunal under the Constitution, and not the States, to decide. You may ask why I speak of these differences of Jefferson and Marshall when I have been chosen to speak of Marshall alone. I do it to show you the wisdom of Marshall and the great results which flowed from his sagacity.

In referring to the differences between these men, it is not for the purpose of belittling Jefferson, but to accord to Marshall his just meed of praise. As a President compelled to follow the Marshall theory, it may well be doubted whether any man who succeeded Mr. Jefferson

in the Presidential office ever contributed so much by his policy to the greatness of this country.

Senator Chase, who was afterwards Chief Justice of the United States, was making a speech in the Senate on the subject of slavery, and after quoting from certain utterances of Jefferson showing he was opposed to slavery, said: "I do not know that any monument has been erected over Jefferson in Virginia." Senator Mason said: "There is — a granite obelisk." Chase replied: "No monumental marble bears a nobler name." Senator Seward said: "The inscription is: 'Here was buried Thomas Jefferson, author of the Declaration of American Independence, of the statute of Virginia for religious freedom, and the father of the University of Virginia.'" Chase then said: "It is an appropriate inscription, and worthily commemorates distinguished services. But, Mr. President, if a stranger from some foreign country should ask me for the monument of Jefferson, I would not take him to Virginia and bid him look on a granite obelisk, however admirable its proportions or its inscription. I would ask him to accompany me beyond the Alleghanies, into the great Northwest, and I would say to him: '*Si monumentum requiris, circumspice* — behold on every side his monument.' These thronged cities; these flourishing villages; these cultivated fields; these million of happy homes of prosperous freemen; these churches; these asylums for the unfortunate and helpless; these institutions of education, religion and humanity; these great States — great in their present resources, but far greater in their mighty energies by which the resources are to be developed, — these are the monuments of Jefferson. His monument is all over our western land —

'Our meanest rill, our mightiest river,  
Rolls mingling with his fame forever.' "

Such is the tribute rendered to Jefferson, not by one who agreed with him as to his theory of the government formed by the Constitution of the United States, and such is the tribute now paid him by your orator.

But I do not stop where Senator Chase did. What he described as Jefferson's monument no more describes another monument of his greatness than does the simple granite obelisk in the State of Virginia. If a stranger from a foreign land were to come to me and ask me where is Jefferson's greatest monument, I would not allow him to tarry long in the great Northwest, but would bring him within the confines of the Louisiana Purchase, out of which is carved Louisiana, Arkansas, Missouri, Iowa, Minnesota, South Dakota, North Dakota, Colorado, Wyoming, Montana, Oregon, Washington, Oklahoma and Indian Territories, and last but not least, the great Mississippi river and its tributaries, with the right of navigation free of toll from its source to its mouth. I would bid him view the thronged cities therein; the flourishing villages; the cultivated fields; the millions of happy homes of prosperous freemen; the churches; the asylums for the unfortunate and helpless; the institutions of education, religion and humanity, and say: "This, of all the monuments evidencing the sagacity and foresight of Jefferson, is the greatest, the most lasting, and most enduring." Yet if, during the first term of Jefferson, South Carolina had elected to do what it did in 1832, under Jackson's administration, and he had adhered and allowed his action to be controlled by the Virginia and Kentucky resolutions, the monument to which we all now point with pride would not exist. Marshall, by his construction of the Constitution, created a Nation; to that Nation, through Jefferson, came the States of Ohio, Indiana,



Illinois, Wisconsin and Michigan freed from the blight of slavery. Jackson preserved that Nation, and these three constitute a trinity, whose monuments are as one.

Later on the theory for which Jefferson contended led to a conflict wherein men, who, as children, nursed the same mother's breast; who repeated the same prayer at her knee; who were baptized at the same font and confirmed at the same chancel, were arrayed against each other, and ere it was ended, sorrow and grief were written on the glad brow of childhood; the heart and hope of youth were chilled; the life current of early manhood reddened an hundred battle fields; the step of the gray-haired father and mother was quickened on its pace to the grave, and the bridal wreath was turned into widow's weeds in the honeymoon of wedlock. The conflict ended, and that for which Marshall contended triumphed, and that for which Jefferson contended became the "lost cause."

Justice Story, in 1835, in an address before the Suffolk Bar, in speaking of Marshall, says: "He who has been enabled by the force of his talents and the example of his virtues to identify his own character with the solid interests and happiness of his country; he who has lived long enough to stamp the impressions of his own mind upon the age, and has left on record lessons of wisdom for the study and improvement of all posterity,— he, I say, has attained all that a truly good man aims at, and all that a truly great man should aspire to. He has erected a monument to his memory in the hearts of men. Their gratitude will perpetually, though it may be silently, breathe forth his praises; and the voluntary homage paid to his name will speak a language more intelligible and more universal than any epitaph inscribed on Parian marble, or any image wrought out by the cunning

hands of sculpture. . . . Even if the Constitution of his country should perish, his glorious judgments will still remain to instruct mankind, until liberty shall cease to be a blessing, and the science of jurisprudence shall vanish from the catalogue of human pursuits."

One hundred years ago to-day Marshall took the oath of office as Chief Justice of the United States, and his seat on the bench of the Supreme Court. I have heard men express wonder as to where and when he acquired the wonderful knowledge of the law which subsequent events showed him to possess. The question is easily answered. He learned it largely as all great judges have learned it, from the lawyers appearing before them. It was taught him by Dallas, Tilghman, McKean, Ingersoll, Lewis, Mason, Lee, Minor, Key, Jones, Swann, Simms, Harper, Breckenridge, Martin, Rodney, Hare, Rawle, Clay, Bradley, Broom, Youngs, Adams, Binney, Winder, Pinkney, Dexter, Sedgwick, Webster, Wheaton, Ogden, Sergeant, Wirt, Wickliffe, Berrien, Taney, Peters, Grundy, Ewing, Vinton, Bibb, Frelinghuysen, and a score of others.

He knew that it was not the knowledge of the law which he acquired before he went on the Bench that would make him a great judge. He knew that in a judicial position if he acquired a knowledge of the law at all it had to be acquired from the lawyers. It does not appear that he ever left the Bench during the argument of a cause, and let it proceed while he took his lunch; nor does it appear that during the argument of a cause he spent his time reading his correspondence, or the proof sheets of an opinion in another case; nor does it appear he went to sleep on the Bench when a case was being argued. Story, who was on the Bench with him, says: "He was solicitous to hear arguments and

reluctant to decide causes without them. No matter whether the subject was new or old, familiar to his thoughts or remote from them, buried under a mass of obsolete learning or developed for the first time yesterday — whatever its nature, he courted argument, nay, he demanded it." It was this, and not the gown and commission, that made him a great judge. When he presided over the court, you never saw a smile of satisfaction pass over his face, or that of his associates, when it was announced the cause would be submitted without argument, nor would you hear a sigh of relief passing upward carrying the words: "Thank God for that."

Moses lies in a lonely grave by Nebo's mountain, in a vale in the land of Moab. After the centuries which have passed since his death, the law which he brought from Sinai's mount has stood the test of time, and is to-day the woof and warp of the morality of the civilized world. He was at the birth of the ten commandments, as Marshall was at the birth of constitutional law. The law Moses found for the children of Israel has withstood the centuries of the past and will withstand the centuries to come. That which Marshall found has survived a century, and will so continue as long as constitutional government shall exist, and the winds that pass over Beth-peor's hills, as they in their course pass over the nation made by Marshall, will chant a requiem to the greatest jurist of any age or any clime.

#### **Address of U. M. Rose.**

I am not here to pronounce a eulogy on John Marshall; but the language that would express the most sober and discriminating estimate of his character might easily be mistaken for eulogy. There is not a man living that

could add anything to his fame, or that could pluck a single leaf from the chaplet of laurel with which he was crowned by public acclamation long ago. Though younger in years, he was contemporaneous with that remarkable galaxy of men that sat around the cradle of American liberty; men such as Washington, Hamilton, Franklin, Madison, Jefferson, and a score of others that might be mentioned, all men of extraordinary ability, all animated by the same devotion to the cause of their country, which was at the same time the cause of humanity. Never since the age of Pericles had a country so small in population produced so many men in the same generation of such splendid endowments. Born with a keen thirst for knowledge, and impelled by an ardent emulation to profit by their illustrious example, John Marshall had the advantage of knowing personally in their declining years all of these great fathers of the Republic, of observing their lives, and storing in his memory words of wisdom which in after days served him for guidance and for inspiration; so that his whole life became a sort of continuation of their traditions and of their manly virtues.

The name of Marshall is as inseparably connected with the Constitution of the United States as that of Hamilton or Madison or of any one else that helped to frame that instrument. If others conceived the form of government which it was to ordain, it was Marshall that, more than any other one man, gave precision to its meaning, and translated it from a seeming abstraction into a practical force, suited to the varied exigencies of national life. The value of the Constitution and of the interpretation which it has received are both attested by the fact that under their combined influence we have increased in wealth, in population and in intelligence in a ratio of which history has



never recorded a kindred example. If we have failed in some things, and if, considering our opportunities, we are neither as good nor as wise as we ought to be, the fault has not been with the Constitution, nor with the decisions of Marshall, but with ourselves. We have had the largest measure of personal freedom. We have had the selection of our own rulers; so that we cannot lay any serious miscarriage to the form of our government. It is imperfect, as all things that we know are imperfect; but it is extremely doubtful whether anything better could be devised. Judging from the result of experiments that have been made in other countries we have abundant reason to be content with the instrument itself, and with the interpretation of the powers of the government by the great Chief Justice and his colleagues to whom this grave and important duty was intrusted; reflecting that there is no government that by its own unaided action will of itself work out satisfactory results. A popular government must always reflect the follies and demerits of those by whom it is controlled, as well as their virtues; and eternal vigilance is not only the price of liberty, but it is the price of almost everything else that is worth having.

Mr. Gladstone spoke of the American Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." This saying has been made the subject of rash and unmerited criticism, as if it had been intended to convey the idea that the Constitution owed nothing to pre-existing institutions, to the lessons of history, or to the labors of many illustrious men in the science of government. It is needless to say that if the framers of that instrument had discarded such obvious means of enlightenment their work would have

proved but an abortion. In one sense it is certainly true that there is nothing new under the sun. It detracts not from the fame of the inventor of the steam-engine to say that he only made use of a well-known force and of well-known materials to accomplish his results. So it was with the framers of the Constitution. The materials with which to accomplish their task were at hand; but the work of combination and adjustment between the powers of the Federal Government and those of the several States, and between the different departments of the Federal Government, required a discriminating wisdom which might well excite the admiration of the great English statesman. But Gladstone was not alone in his opinion; for the American Constitution has been used as a model for every written constitution that has been formed in any part of the world since its adoption. If imitation is the sincerest form of flattery it is because it affords evidence of real admiration.

The Constitution of the United States was indeed the result of a long and a complex evolution. The Continental Congress, organized in 1774, by the assumption of powers not expressly granted, and by a display of vigilance rarely equaled, managed for six years to preserve the country from the most fatal of calamities; but when it was superseded by the Articles of Confederation the bonds of union were practically dissolved, and the government fell into such a state of impotency that it was powerless to enforce its edicts, or to command respect either at home or abroad. The creation of this phantom, miscalled a government, added untold difficulties to the task set before Washington, which was already burdened with inconceivable embarrassment. On the 7th day of June, 1781, just before the disbanding of the army, he

addressed a circular letter to the Governors and Presidents of the States, urging the necessity for a closer union; but the time was not yet ripe for any definite action. In the meantime the States proceeded on their several ways, each endeavoring to enrich itself in the good old medieval fashion. New York levied heavy duties on every vessel that entered her ports, on all merchandise that crossed her border, on every wagon load of wood that came from Connecticut, on all of the marketing that came from New Jersey. Connecticut retaliated by a league of her business men agreeing not to have any commerce or intercourse with New York or her people. New Jersey retaliated by taxing at the rate of \$1,800 a year a small lighthouse that New York had erected within her borders on an acre of sandy beach that she had bought for that purpose. A colony from Connecticut having settled in the Wyoming valley in Pennsylvania, the legislature of Pennsylvania sent a troop of soldiers to seize their lands, which they had bought and paid for, and to drive them into the wilderness. Their homes were burnt, five hundred people were turned out of doors, many died from sickness and exposure, and seventy-six were captured, handcuffed and put in jail. All of the States except Delaware and Connecticut were seized with a frenzy for the issue of paper money, which, declining steadily in value, produced widespread calamity and distress, ending in riots and open resistance to the holding of the courts and the collection of debts.

Every State had some quarrel with its neighbors, and the country was fast drifting into anarchy. Commerce languished, public credit expired, business of all kinds was paralyzed, and intelligent men in the old world made up their minds that the American experiment had speed-

ily come to a disastrous end; while not a few on this side of the water were inclined to the same dismal conclusion. But in the impending gloom Washington still preserved his faith in that community of sympathy and interest which at a later date the greatest of civil wars could not obliterate. In the darkest hour of that period of discord and despondency he wrote: "It is as clear to me as A, B, C, that an extension of Federal powers would make us one of the most happy, wealthy, respectable and powerful nations that ever inhabited the terrestrial globe. Without them we shall soon be everything which is the direct reverse. I predict the worst consequences from a half-starved, limping government, always moving upon crutches, and tottering at every step."

It may seem now to have been an easy thing for Washington to predict the future greatness and prosperity of his country; but at that time his prophecy was no doubt regarded with a good deal of incredulity. It was at a still later date that as bright a man as Fisher Ames, in speaking of the unoccupied territory of the United States, said: "It is an immeasurable wilderness; and when it will be settled is past calculation. Probably it will be near a century before these people will be considerable."

After many abortive efforts the States were induced to send their delegates in a half-hearted way to the convention that met in Independence Hall, at Philadelphia, for the purpose of forming a more perfect union. During the session of that convention Washington one day made a few remarks that probably have had an immense effect on the destiny of our country. It often happened that when a proposition was made some member would object to it, not because it was not wise, but because, if inserted in the Constitution, the Constitution would not be

adopted by the people of the States. Having heard this objection often repeated, Washington at last rose from the chair in which he was presiding, and said with some emotion:

“It is but too probable that no plan that we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God.”

From that time the argument in favor of a makeshift Constitution was heard no more.

The formation of the Union of the States was primarily due to Washington. Without his enormous influence the task would have been hopeless. Grayson, who opposed the adoption of the Constitution, said:

“Were it not for one great character in America so many men would not be for the government. We do not fear while he lives; but who besides him can concentrate the confidence and affections of all America?” Monroe wrote to Jefferson: “Be assured Washington’s influence carried this government.” Mr. Bancroft says that if the idea had not prevailed that Washington would accept the Presidency, the Constitution could not have been adopted. But the form which the Constitution assumed was due to Madison more than to any other man; and he was fitly called the Father of the Constitution.

It was in the Virginia Convention convoked to consider the question of the adoption of the Constitution that we first catch a glimpse of John Marshall in a scene worthy of his talents.

“Conspicuous in the ranks of Federalists, and unsur-



passed in debate," says Mr. Fiske, "was a tall and gaunt young man, with beaming countenance, eyes of piercing brilliancy, and an indescribable kingliness of bearing, who was by and by to become Chief Justice of the United States, and by his masterly and far-reaching decisions to win a place side by side with Madison and Hamilton among the founders of our National Government. John Marshall, second to none among all the illustrious jurists of the English race, was then, at the age of thirty-three, the foremost lawyer of Virginia. He had already served for several terms in the State legislature; but his national career began in this convention, where his arguments, with those of Madison, re-enforcing each other, bore down all opposition."

Yet in that convention the Constitution was only carried by ten votes. In New York it was only adopted by a majority of three votes, notwithstanding the superhuman efforts of Hamilton; and after that so little interest in the new government was felt in that State that her people took no part in the first election of Washington to the Presidency.

When Marshall accepted the position of Chief Justice we may well suppose that he did so with great reluctance. Now when our country has become a giant among the nations of the earth it is difficult for us to have a realizing sense of the feebleness of our infancy a hundred years ago, when the only great thing to be noted in our condition was the group of great men that moulded the national destiny. At that time the entire population of the United States, settled almost wholly along the Atlantic coast, was about the same as that of the present State of Illinois; and of these nearly one-fifth were slaves. The territory now forming the States of

Alabama and Mississippi was in possession of the Indians, and was appropriately called the Indian Territory. The vast extent of country north of the Ohio river, extending from the Alleghanies to the Mississippi river, and from the Ohio to the lakes, was a wilderness. Only a few hardy pioneers had immigrated from beyond the mountains to Kentucky and Tennessee. Florida belonged to Spain, Louisiana to France, and all of the country west of the Mississippi, reaching to the Pacific, nearly the whole of which was unexplored, belonged to those two countries. With the exception of New York, which had sixty thousand inhabitants, there was not a city in the United States as large as Little Rock is now. Philadelphia had 41,000, and Boston nearly 25,000. The national capital recently established at Washington might then be considered as a sort of Tadmor in the wilderness, since a city begun but not yet built and a city that has been destroyed possess certain features in common. The total revenues of the government for the year 1800 were less than \$13,000,000.

Communication between the different parts of the country was slow and difficult. It took the daily stage coach, traveling at what was then considered a dizzy rate of speed, from a week to ten days to traverse the distance from Boston to New York, a longer time than it takes now to go from Maine to California. The country, still suffering from the exhaustion caused by the Revolution, and from the weakness of the late Confederation, was depressed, and the future looked dark and uncertain. The Supreme Court had acquired no prestige; and its tremendous influence on the future destiny of the government was as yet unforeseen. The salary of the Chief Justice was fixed at \$4,000 a year. Marshall had only a

short time previously declined a seat in the same court. Plainly the offer, under these circumstances, of the place of Chief Justice to a man in the very noonday of life, who was the acknowledged leader of the Bar in Virginia, was not intrinsically tempting. Had he imbibed that commercial spirit, as it is called, that so largely prevails to-day, he certainly would have declined. If he had declined, and a weak man had succeeded to the position, it is probable that the consequences would have been eminently disastrous. Nearly all of the decisions that have been rendered by the Supreme Court on great constitutional questions have been by a divided court; and several times by a majority of only one. If you would see what abysses we have escaped you have only to read the dissenting opinions from the organization of the court down to the present time.

Nothing could have been more fortunate than the appointment of Marshall; and it has been well said that it redeemed all of the faults of the administration of the elder Adams, a man of intense patriotism and of great ability, but sometimes wanting in practical wisdom. When Marshall took his seat on the bench one hundred years ago to-day, the government was endowed with a new force; the judicial department had a man at the helm with a clear head, a pure heart and a strong arm, in all things qualified to perform the momentous duties assigned to him, destined to maintain the Constitution and uphold the majesty of the law for more than a third of a century. The influence of such a man under such circumstances is something that is wholly beyond human computation.

When the Constitution had been once adopted, men read into it different meanings according to their pred-

ilection or their prejudices. It began by the words: "We, the People of the United States." After it had been engrossed a member suggested that the words, "Done in convention by the unanimous consent of the States present," be added; which was done without objection; the purpose being to show that it was equally binding on the people and on the States. Though there was nothing inconsistent in these two phrases, yet each became the watchword of two different political parties, one asserting that the whole people were bound by the compact, and the other that the Constitution was only a league between the several States; a controversy which called into existence immense libraries of books and pamphlets, with speeches innumerable, and which was not definitely settled until the close of our Civil War.

But that was not the only question to be passed on. The Constitution is extremely terse and concise; necessarily so because in the grant of powers to a government it is quite impossible to foresee and to provide for the special circumstances under which they are to be exercised. If the Constitution had gone more into details the difficulties of construction would have been increased, because prolixity and perspicuity are by no means convertible terms. The real meaning of the Constitution as applied to any particular state of facts could only be understood as occasion should arise; and to the Supreme Court was delegated this duty, the most important that ever devolved on any court of justice. To the old lawyers of the common law, of whom Coke is the most famous example, the only way to construe a written law was to regard it much as a military order is regarded by subordinates; that is, literally, by the most obvious meaning of the words, and by the aid of a dictionary, if

need be. It may be said that it is mostly due to Lord Nottingham and to Lord Hardwicke that this literal method, which often resulted in the grossest absurdities, has been generally superseded, except in the domain of the criminal law, by a method that looks not only to the words, but to the time, place and circumstances under which they were used, so as to get at the true legislative intent. It was natural that those who had opposed the adoption of the Constitution should favor such a strict construction as would confine the powers of the Federal Government to the narrowest range possible. On the other hand there were those who favored such a latitudinarian construction as would immeasurably enlarge the Federal power, and would tend to dwarf the States down to the last fraction of insignificance. It was the sincere aim of Marshall to avoid either extreme; and the general verdict is that he succeeded in doing so in a manner quite impossible to any one not possessed of like abilities joined to the most impartial judgment.

No one ever had finer opportunities for understanding the Constitution than Marshall. He had heard its provisions and its objects discussed from every possible standpoint by men of extraordinary talents from his youth up, and in that immortal discussion he had himself taken an important part, in the settling of the questions that arose for decision he had the aid of lawyers of pre-eminent ability, at a time when the bar had a luster which perhaps it has never since recovered; and he gave to them the deliberate and laborious attention of a mind whose vigor and acuteness in the solution of legal questions excited and still commands universal respect and admiration. But clear as his convictions undoubtedly were, no one can read his decisions on grave constitu-



tional disputes without perceiving that he was habitually oppressed by a profound sense of the heavy responsibility which he incurred in the discharge of so sacred a duty. In such cases that sentiment seems to pervade his opinions like the deep and solemn undertone of the sea. Many of these questions had an importance far greater than any that had ever been presented to any human tribunal. When Lord Hardwicke in 1750 decided the case of *Penn v. Lord Baltimore*, that had been pending in his court for more than seventy years, and which involved the boundary between the provinces of Pennsylvania and Maryland, being impressed with the magnitude of the controversy, he spoke of it as one "for the determination of the right and boundaries of two great provincial governments and three counties, of a nature worthy of the judicature of a Roman senate rather than of a single judge." And yet that controversy was but small and insignificant contrasted with many that came before Marshall, involving the future of our country for all time to come. That he was absolutely infallible his warmest admirer would not claim; but the constantly diminishing number of his critics and the diminishing number of their followers sufficiently attest the fact that his immense fame as a judge is well founded and imperishable. No other judge had so many things to do; no other did them so well.

Marshall from his youth up was a man of studious habits and of indefatigable industry; but in addition to these he had what few men ever possessed, a genius for the law as distinct as that of Napoleon for war. In that specialty he was thoroughly at home; and within its limits he is conspicuously pre-eminent. His colleague, Judge Story, was more learned than he; but Story him-

self was always the first to admit the superiority of Marshall; a remarkable instance, because very learned men are apt to overvalue their special attainments, and to undervalue the qualifications of those of inferior acquirements, though possessed of greater native ability. There was a natural modesty about Marshall that disarmed rivalry; but it is but just to say that this lofty appreciation of his colleague of itself indicates unusual elevation and nobility of character on the part of Judge Story. Indeed the close friendship that subsisted between these two great judges, which was only dissolved by death, is one of the most admirable episodes to be found in the history of our country.

Marshall possessed in an eminent degree the most essential qualities that go to the making of a judge. He was a thoroughly pure man; sincere, upright and conscientious, with a strong and wholesome sense of what is right and what is wrong. He possessed also a happy and well-poised judicial temperament, with that fearlessness and independence of character that enables one to perform his duty as God gives him grace to see it without regard to praise or blame. Living in tumultuous times he was often censured and maligned; but as the needle of the compass in the middle of the ship still points unerringly toward the polar star, regardless of wind or wave, so no amount of clamor, or censure, or applause could induce him to diverge a hair's breadth from what, with coolest and most dispassionate judgment, he deemed to be the line of duty. No judge was ever endowed with a clearer vision of the most complex problems that can be presented by the endless combinations of human affairs. He possessed a most remarkable faculty of separating the relevant from the greatest mass of distracting

and misleading matter, and of going straight to the heart of every controversy. In the clearness and lucidity of statement which leaves nothing upon which to hang a doubt he was probably never excelled. In this respect his opinions are models for all time. He did not sow them thick with multitudinous citations; and when he has recited the facts and has declared the law we feel that he has made everything so clear that a reference to numerous authorities would be superfluous. But it must not be supposed that because he avoided a needless display of learning Marshall did not examine attentively all of the sources of legal knowledge before making up his judgments. No man was more untiring in his investigations, or more unflagging in his researches; hence it is very dangerous to take it for granted that any opinion of his is not based on the most exhaustive inquiry as to former precedents. That very able and discriminating jurist, Mr. Hare, in his note to the opinion delivered by Marshall in *Field v. Holland*, says rather sarcastically: "Mr. Justice Cowen, in *Pattison v. Hull*, had satisfied himself that he had consigned to insignificance this conclusive authority by observing that in this case the books do not appear to have been consulted. It should be remembered, however, that there are some judges who consult more books than they quote, as there are others who quote more books than they understand."

One striking quality to be noticed in the opinions of Marshall is the sparing use that he makes of analogies. No one knew better that, though analogies are often very striking, they are in general extremely prone to deceive and mislead. With his close reasoning, his masterly and convincing logic, he had no need of such adventitious aid. Fixing his gaze searchingly on the law and the facts of

the case in hand, he was able to reach satisfactory conclusions without invoking similitudes which might be only casual or incidental; and it is largely for this reason that we do not find in his long succession of adjudications those discrepancies and seeming contradictions that sometimes mar the decisions of judges not undistinguished for learning or for ability.

It has been said of some artists that by continually re-touching and by over-elaboration they deprived their works of originality, and divested them of that individual stamp that constituted their chief merit. No such charge could be laid at the door of Marshall. He never attempted to embellish his opinions by fine writing, or by showy declamation, nor to exhaust his subject down to the last word or syllable. It was said by a great master of the art of expression that the style is the man; and the saying is certainly true of Marshall. His character was of Doric simplicity; and his style is more remarkable for its strength and unmistakable clearness of outline than for any other quality. From the first opinion that he delivered in the prime of his manhood down to the last that he delivered when he was an old man eighty years of age, we perceive the same clear and steady light illuminating everywhere the wide and varied fields of jurisprudence. If the quality of his work has a uniform excellence its scope is immense; and it remains for us and for those who are to come after us, an invaluable inheritance forever. Generations hence, when, after a thousand vicissitudes, the face of the earth shall have been changed and renewed, and when the social and national life shall have been modified by a thousand influences of which we can have no conception, his name will be as a beacon to guide, to guard and preserve. Had he written no opin-

ions save those explanatory of the principles of constitutional law, they would be remembered and studied as long as the science of government is cultivated; but his labors were not confined to these; and there is no domain of the law that he has not enriched with the inexhaustible treasures of his genius.

It is no impeachment of the glory and renown of the greatest of the Roman jurists, or of the most illustrious of the judges of England, to say that in magnitude and importance his works far transcend their united achievements. Like them he sounded all of the depths of the law; but while they expanded and ameliorated the wide circle of existing systems of jurisprudence, a task in which he proved not inferior to any of them, his duties called him beyond into the virgin fields of constitutional law, where mere precedents could not avail, and where all of the resources of wise, prudent and discerning statesmanship were indispensable requisites. As a member of the Convention of Virginia, and during his brief career in Congress, Marshall exhibited all of the talents of the statesman as well as those of the most accomplished debater. If during his term as Chief Justice he could also have had a seat in the Senate, as Mansfield and Camden had in the House of Lords, his influence in the legislative department would probably have been weightier and more decisive than theirs. But the qualities that would have enabled him to achieve other triumphs were not left to rust unused; for in the unexampled condition in which the new government was placed, the construction of the Constitution demanded of the court over which he presided all of the knowledge and all of the ability which the most perplexing emergencies could exact from the rulers of nations. Here it was that he vindicated his



claim to be considered not only as a great judge, but as a statesman on a level with the highest and the most accomplished that the world has seen; with such men as Madison and Hamilton, whose labors he was destined to continue and to perfect. He built on the foundations that they had laid; but with such masterly ability that no seam or fissure in the completed structure betrays any want of proportion or of harmony, or any disparity in the workmanship. In view of his double fame as a jurist and as a statesman, crowning the labors of a life-time, John Marshall occupies a position on the page of history, and in the realm of thought, that is solitary and unique.

His contemporaries have handed down to us many pleasant anecdotes illustrative of the unaffected simplicity and affability of manners of this great judge; of his gentleness of demeanor, his kindly consideration for the poor, the humble and the offending; his sincerity, his unsuspecting and guileless nature, his freedom from envy and hatred and jealousy; a thousand virtues that endeared him to all who knew him, and bound his friends to him with hooks of steel. Perhaps it was not quite unfit that at last, when his career was done, he should die within sound of the old liberty bell that had first proclaimed the birth of a nation on the shores of the western world, and in sight of that hall, sacred to the most inspiring memories, where, under the presiding genius of Washington, had been framed that Constitution which he had so long and so ably expounded. In that fatal hour, when the world receded from his view, he could look back without regret over a well spent life; a life full of labor and high endeavor, bathed in the

“Eternal sunshine of the spotless mind.”

Old Ennius, the father of Latin poetry, expressed the hope that after he had crossed the Stygian river he might still live on the lips of men. His wish has been fulfilled; for, although his works have been mostly lost, his name is still remembered. We cannot analyze true greatness or assign the limits of its duration in the minds of men. Nothing is more permanent, and, in many cases seemingly more unsubstantial, than the immortality of fame. It crowns the verse of the gentlest of poets as well as the bloody deeds of the warrior; it confers its benedictions on the orator whose impassioned tones after a thousand years seem still to linger on the printed page; on the artist whose name may outlive the revelations of his genius; and in the case of a great musical composer, such as a Beethoven or a Mozart, eternal fame is built on nothing more solid than invisible sound-waves; and yet it is more indestructible than monuments of brass. A grateful people have erected a statue to Marshall in a conspicuous spot in the National Capital, in obedience to a natural instinct that has induced men from most remote times down to the present to commemorate in materials seemingly enduring their love and veneration for departed worth; but there is nothing to guaranty such memorials

“ . . . ’gainst the tooth of time  
And razure of oblivion.”

If we visit the lands where the arts and sciences first rose and flourished, the fallen column, the broken arch, the shattered frieze proclaim with silent eloquence the mutability of all things made by human hands. Not even the divine beauty of the creations of Phidias, which lifted to ecstasy the thoughts of the unlettered Athenian populace, could save them from the hand of the destroyer. But Fame, faithful to her trust, preserves amid ruin and

desolation the treasures committed to her keeping. Nearly two thousand years have elapsed since any human eye gazed on the canvas of Apelles; but his name is still enrolled as the greatest of painters. If all of the writings of Marshall could be committed to the flames, his name would still linger on; but with the fecundity of the press, which will preserve and multiply every word that he wrote, his voice will still continue to be heard by all coming generations and will serve to enlighten and to instruct, pleading with unabated earnestness for whatever is right, and reasonable, and just, and of good report. His name will be hereafter mentioned along with those of Ulpian and Papinian and all great jurists and statesmen whose labors have contributed to build up that universal jurisprudence which is the strongest ally of civilization, the surest refuge against wrong and oppression, the most powerful defender of injured innocence. His fame will not perish in the vortex of revolutions; but will continue to shine with unabated splendor as long as history shall dedicate its pages to the memory of great talents united to transcendent virtues.

### EXERCISES AT FORT SMITH.

Pursuant to resolution of the Fort Smith Bar Association, a meeting thereof to which the public had been invited was held in the United States court room at Fort Smith, Monday evening, February 4, 1901, to commemorate the one hundredth anniversary of the accession of John Marshall of Virginia to the Chief Justiceship of the United States.

James F. Read, President of the Association, presided. Charles E. Warner was elected acting secretary. President Read then reviewed briefly the action of the Fort

Smith Bar Association, in accord with the suggestion of the American Bar Association and the Bar Association of Arkansas in arranging for the meeting, and announced that John H. Rogers, judge of the United States Court for the Western District of Arkansas, had consented to deliver an address upon the occasion. He then presented Judge Rogers as the orator of the day.

#### **Address of John H. Rogers.**

Candor constrains me to say that when the duty I shall now attempt to discharge was imposed, conscious of my unfitness, I shrank from the undertaking, and had a proper regard for the wishes of the Bar, who tendered me the invitation, permitted, I should have declined. And now, after such examination of the limited sources of information accessible, as the brief time at my disposal allowed, I am only the more impressed with my inability to faithfully interpret and worthily present the majestic character and eminent services to our country of John Marshall, whose unsought elevation, one hundred years ago to-day, to the exalted station of Chief Justice of the Supreme Court of the United States, we have met to commemorate. But, as said by that venerable and famous lawyer and orator of the Philadelphia bar — Horace Binney — in an address delivered in that city in 1835, not long after the death of Chief Justice Marshall:

“It is the consolation of the humblest, as it ought to be of the most gifted, of his eulogists, that the case of this illustrious man is one in which to give with simplicity the record of his life is to come nearest to a resemblance of the great original.”

For it is indeed true the life of the great Chief Justice was one of the greatest simplicity, and its truthful recital

in the simplest language is its loftiest eulogy and its most unblemished and befitting memorial.

It would be impossible for us to rightly comprehend the life and services and character of Marshall without some insight into his antecedents, his early training, his environment in his youth, and something of the conditions of the country while he grew up to manhood. I dare say that in our admiration for his transcendent talents as a great jurist, and especially of his fame as an expounder of the Constitution, most of us have lost sight of his origin and the conditions which contributed so largely to his power, his courage, his character and his devotion to his country, as well as his professional, military, legislative, diplomatic and cabinet services, in all of which stations his career was marked by distinction and unsurpassed loyalty and fidelity to duty. It should not be forgotten that to overlook this part of his career is to pass by the very things which fitted him for the exalted station which he adorned and honored above all of its incumbents down to the present day. A distinguished lawyer of the American bar recently said: "A mere lawyer may be very well meaning and a useful man; but he never was and never will be a great judge." And if this be true generally, how much more was it true when Marshall was made Chief Justice and called upon to interpret and expound for the first time a written constitution, the organic law of an infant nation, of whose institutions the world's history afforded no example and the jurisprudence of nations no precedent. True, to blaze out — pioneer-like — the pathway of a nation involved a profound knowledge of the science of the law; but it also demanded a knowledge of the powers and duties of legislative assemblies, of diplomacy and statesmanship, of the



traditions, history and the growth of the institutions of his country and of the mother country from whose dominion it had been released, but whose laws and customs it had inherited. Indeed it required the mastery of the whole science of government, free and arbitrary, and of the rights, duties and relations of citizenship, and of the great purposes the people had in view when they instituted their government.

If we trace from its origin, necessarily in meagre outlines, the life of Marshall, we shall see how it happened that he was prepared and equipped for his great office; for as sure as there is an overruling Providence, Marshall as Chief Justice was not an accident; and if not an accident, the study of his life ought to be not only instructive but useful, and never more so than now when our country, hitherto prosperous and happy beyond all the nations of the world, is beginning a second century big with portentous events involving the welfare of seventy-seven millions of liberty-loving freemen at home, and in no small degree free government all over the world.

[The learned judge here sketched with requisite fullness the private life and public career of Marshall.]

This meagre and incomplete outline of Chief Justice Marshall's career but inadequately portrays his preparation and equipment for his great office, and justifies the wisdom of President Adams in making the appointment. But as the fathers, when they framed the Constitution, builded wiser than they knew, so Marshall in defending it had shown his own fitness for the high place to which he was called, and in which he served his country so well, and made his name immortal.

As Marshall had consecrated his young manhood to the liberation of his country, and his middle life to the

establishment and defense of its new and untried scheme of government, so the remainder was now consecrated to the interpretation of its laws, the expounding of its Constitution, and in laying the broad foundations upon which the massive Federal superstructure was to be erected.

The administration of President Adams terminated and that of Thomas Jefferson began one month after John Marshall became Chief Justice. The Supreme Court had been organized eleven years, and not to exceed six cases had been decided involving constitutional questions. Some of these had created intense feeling, notably that of *Chisholm v. State of Georgia*, in which the court held that a sovereign State might be impleaded by a citizen of another State in the Circuit Court of the United States. This decision was condemned by the country and overturned by the eleventh amendment to the Constitution, which was ratified in 1793. And it may be observed in passing, that this decision, which failed to meet the approbation of the country, was by the country corrected in the manner pointed out by the Constitution, our forefathers thereby establishing a precedent worthy of all future observance, at the same time showing that they were capable of preserving by peaceful and lawful methods the right they had won by arms — that of governing themselves.

Enough, therefore, had been done by the court to warn its members that it was to be a target in all cases involving the determination of constitutional questions. Marshall not only knew this, but he knew the hostility of the incoming administration to the views of the Federalists, with which party he was politically affiliated. Whatever may have been the personal relations between Marshall and Jefferson, now the respective heads of two

of the three co-ordinate branches of the government, there was no hope that Marshall would escape, in his great office, many unavoidable and unhappy situations, and severe, if not malignant, criticism. But calm, self-possessed, modest, cautious, conscientious, and considerate of others, unswerving in his devotion to his country, unbending in his courageous loyalty to duty, and intensely laborious, he was nevertheless tolerant of opposing opinions, but steadfast in asserting his own, and unrivaled in sustaining them with a clearness and simplicity of statement, and with a persuasive logic so strong, so comprehensive and satisfactory as to challenge refutation without giving offense or leaving wounds which would not heal. As was to be expected, it was not long after he assumed his new office when a singularly disagreeable duty was imposed — that of deciding the noted case of *Marbury v. Madison*. . . . It was a petition for *mandamus* against James Madison, the Secretary of State under Mr. Jefferson, to compel him to deliver to James Marbury his commission as justice of the peace of the District of Columbia.

Chief Justice Marshall, delivering the opinion, held that Marbury's appointment was complete when the commission was signed and sealed, but denied the writ because the act of Congress conferring power on the Supreme Court to issue the writ was unconstitutional, and therefore void. One can scarcely read this opinion now without concluding that the position of the court was impregnable, nor can one fail to admire the delicacy with which the questions were approached, and yet the unflinching courage with which the case was decided. When this case was decided, the court, so far as I have found, had never been required to determine whether an act of

Congress repugnant to the Constitution was void. It seems strange, now, that any doubt should have existed on that subject; but ours was really our first written Constitution, and the Colonies and Confederation had been accustomed to that condition existing in England where there was no written Constitution, and Parliament was supreme. This opinion, therefore, overturned the whole theory of legislative power, and at once gave the court that exalted position in the government which it has held from that day to this, of being supreme in the construction of the Constitution and the laws and treaties made in pursuance thereof; and for the first time it then became fully known that the American people had indeed placed restraints upon their own improvident, unwise, unjust and hasty action. The simplicity of this opinion, the remarkable resources developed, the unanswerable arguments presented, and the calm dignity and clearness of statement with which the conclusion was reached and announced, challenge admiration and defy dissent.

Of course an address does not admit of an analysis of the cases, covering as they do the whole range of American constitutional law, and extending through a period of thirty-five years, which came from the pen of Chief Justice Marshall. A bare reference to a very few may not be inappropriate. Distinguished writers have doubted whether Marshall ever had the wide range of technical and historical legal learning accorded to some of the great English and American jurists. In a conversation recently with Judge Dillon, himself now one of, if not the ripest jurist and lawyer at the American Bar, he said to me that the late Edward J. Phelps, Ambassador to England under President Cleveland, in speaking of Mr. Justice Field, had said "that he would live by his dissenting

opinions." If one thinks that John Marshall was not as learned and accomplished in law, philosophy and history as he was profound, logical and analytical, let him read his dissenting opinion in *Ogden v. Saunders*, or his opinion in *Johnson v. McIntosh*, and then if not satisfied let him read the splendid exposition of the law of treason, delivered by him in Burr's trial in the Circuit Court of Virginia and reported in 4 Cranch. Perhaps no greater *nisi prius* trial than that of the third Vice-President of the United States for treason ever occurred in this country; and when the nature of the crime is considered, the distinction and character of the accused, the public excitement existing at the time, the almost unrivaled ability and character of the counsel on both sides — the defendant himself an easy equal of any one of them in legal attainments and learning, coupled with the unfriendly relations between President Jefferson and Marshall, I doubt if any trial in this country ever occurred in which the presiding justice was placed in a more delicate or responsible position. The almost matchless power of Luther Martin was met with the peerless oratory of William Wirt. Marshall himself, calm, dignified, at all times unruffled and urbane, could not withhold his tribute to the incomparable manner in which the trial was conducted. Said he, on the threshold of his opinion:

"The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them. A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver."



And just before announcing the conclusion (which was on a motion to discharge Burr because the evidence was insufficient under the Constitution to convict) he evinced the sensitiveness of his exalted nature in language at once a tribute to his ideas of duty in his high station, and an amiable rebuke to suggestions forced on him in the zeal and heat of the argument by counsel. Said he:

“Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly, but which may, perhaps, not improperly receive some notice.

“That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there be no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.”

What loftier and more engaging ideals of judicial honor, duty and urbanity does American jurisprudence offer than is found in the unblemished career of the great Chief Justice?

But there are two cases that no student of American institutions, or of the life of John Marshall, can ignore, if he would fully comprehend the grasp of Marshall's massive intellect, the profundity of his reasoning powers, and the full scope of his foresight as to the future development and destiny of the Republic. They are *M'Culloch v. State of*

Maryland and *Gibbons v. Ogden*. In the former case the question was whether the State of Maryland could impose a tax on a branch of the United States Bank located at Baltimore. In its last analysis the question involved the life of the Federal Government and also the powers of the State. I have no hesitancy in stating that I have never read any opinion which I think comparable to this in all respects, especially in power of statement and reasoning. It goes to the very root of the whole philosophy of the State and National Governments, and principle after principle is stated in language that has been quoted oftener, perhaps, than any opinion of any American judge upon questions of constitutional law. The power to create the bank or corporation was denied. He admitted that the words "bank" or "corporation" were not found in the Constitution, but, said he:

"We find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies."

Then it was he announced the principle which has ever since been universally recognized and widely and frequently applied:

"We admit (said he), as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not

prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”

This principle he demonstrated with a wealth of illustration selected from the provisions of the Constitution that no sophistry or reasoning could shake. Then, guarding the position with an admirable precision, he says:

“Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”

Nothing but a careful study of this great case can give an adequate idea of its fullness.

In *Gibbons v. Ogden* the State of New York granted, for a term of years, to Robert Fulton the exclusive right to navigate the waters of that State with boats moved by steam. Ogden derived from him the right to use such boats in the waters between Elizabethtown, New Jersey, and the city of New York. Gibbons established two steamboats on these waters, and Ogden obtained an injunction against him prohibiting their use. The right to an injunction was affirmed by the Supreme Court of the State of New York, and then, by writ of error, the case was taken to the Supreme Court of the United States. The determination of this question, as is seen at a glance, involved the power of the State of New York to enact the legislation referred to. On Marshall was imposed the duty of drawing the line, under the “Commerce Clause” of the Constitution, between the powers of the State and the powers of the

United States. It was done in a comprehensive, masterly way. I venture the belief that not a single important case from that day to this has been decided in this country, involving the powers of Congress and the States as they relate to State and interstate commerce, in which this case has not been relied on or referred to by one or both sides. In the years that have intervened since the promulgation of that decision, the power of steam on land and river, the telegraph, the telephone, and all the unforeseen appliances of modern inventions which the arts and sciences have discovered, have gone into general use in the commerce of the country, but the principles of *Gibbons v. Ogden*, adapting themselves to all, are still applicable and relied on for the determination of the most complex and intricate questions arising out of our progressive and complicated civilization. Who shall say what the results might have been had Marshall placed on the charter of our liberties a narrow and restricted construction, or had guarded less carefully our new government against the assaults of those who contended for a more elastic construction, limited only by the discretion of Congress?

Although a Federalist, it is believed he never shared the extreme views of the extremists of that party. He took rather a middle ground, well shown by a single paragraph found in *Ogden v. Saunders*. Said he:

“To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its

framers, is to repeat what has been already said more at large, and is all that can be necessary."

Because I cannot improve upon the richness and scope of the thought, may I not adopt a passage found in one of the Yale lectures of Judge Dillon?

"If the Supreme Court during the period of active national development covered by the long official career of Chief Justice John Marshall had put a narrow and inelastic construction upon the Federal Constitution, so that it could not have expanded with the growth and answered the necessities of a great people, it would have been calamitous to an extent no words can portray and no imagination conceive. His views left it possible for the national growth to take place in accordance with the natural process of evolution. Marshall's judgments upon the National Constitution are among the most original and massive works of the human reason. They are almost as important as the texts of the Constitution which they expound. Some of them were, indeed, criticised at the time; but they have immovably established themselves as right in the general judgment of lawyers, public men and the people. Although changes in political parties have been reflected in the *personnel* of the Bench; although unforeseen crises in the national life have been reached and passed, it is remarkable that on not one of his many judgments has been written the word 'overruled,' and equally remarkable that no political party proclaims or holds tenets or doctrines inconsistent with the principles on which those judgments rest. They have become primal lights, shining with the steadfast fidelity of the north star, or the southern cross, for the guidance of the inquirer after American constitutional law."

Amidst his busy, active judicial labors Marshall found



time to prepare his "Life of Washington," in five large volumes, which he afterwards revised and condensed into two volumes.

In 1829, when Chief Justice Marshall was seventy-five years of age, and while he was still Chief Justice, he was elected to represent Richmond in the convention to revise the old constitution of that Commonwealth. In this great body, over which Monroe presided, and of which Madison was a member, and which was composed of the ablest and wisest Virginians of that day, it is said that the "reverence shown Chief Justice Marshall was one of the most beautiful features of the scene." Two great questions divided the convention — the basis of representation and the tenure of judicial office. The feeling as to the former ran so high that there was great danger that the convention would dissolve, and civil discord spread throughout the State. Marshall spoke on both subjects, and no one opposed who did not feel called upon to pay tribute to his wisdom, purity and patriotism.

His famous utterances on the wisdom and the necessity of a pure, stable and independent judiciary were delivered only a short time before his death. They have been called "the last legacy of his political wisdom." It can be truly said that no living man was a more competent or unbiased witness. The last sands of his illustrious life were almost run. Having held for many years a life-tenure in the greatest judicial office in the world, he had nothing to fear, nothing to gain, no selfish purpose to promote. These, then, were the parting words of one whose wide and long experience in public affairs, whose patriotic love for his country had been shown in every branch of public service and at every stage of his manhood, whose private and public life was unspotted, and

whose powers of reason and sense of justice were universally recognized, and whom the country had learned to honor and reverence; and his very life and public services were themselves illustrious exemplifications of the principles he advocated, an enlightened and independent judiciary.

The great Chief Justice was not ashamed, but all his life humbly kneeled before the Creator of all things, and meekly sat, like a little child, at the feet of the lowly Nazarene.

Shall our country ever see his like again?

## STATE OF KANSAS.

The centenary of the accession of John Marshall to the office of Chief Justice of the United States was celebrated in Kansas at Topeka. The committee in charge of the celebration having found it impracticable to arrange for a meeting on "John Marshall Day," February 4, 1901, the exercises were held on the evening of January 31st, in the Supreme Court room of the State Capitol.

The meeting was called to order by Sam Kimble, President of the State Bar Association, and Hon. F. L. Martin was appointed Chairman. Addresses were made by Hon. H. C. Sluss of Wichita, on the subject "John Marshall;" Hon. John D. Milliken, of McPherson, on "The Early Days of Marshall," and Hon. E. W. Cunningham, of Emporia, on "Marshall as the Expounder of the Constitution."

### Address of H. C. Sluss.

The occasion of the present meeting is unique in the history of the world. We celebrate the centennial anniversary of the appointment of a man to the office of a judge. Throughout the whole of our country the people are engaging in the same service. No other such event was ever thus commemorated. In front of our National Capitol in the Capital City there has been placed a statue representing the man in the sitting posture of a judge upon the bench, delivering the opinion of the court. It was placed there by the joint action of the

Congress and the Bar of the United States, to serve as an enduring mark of the gratitude of our people for the services of the judge to our country as the expounder of its Constitution. No such memorial was ever elsewhere erected to commemorate such services. These testimonials, given at such distance of time, and amid the clangor of this busy age, indicate in the plainest way the deep and enduring impression which the judicial work of John Marshall has made upon the institutions of our country and the energizing uplift it has given to the material power of the Nation and the moral power of the people.

In the seventh of Cranch, in a foot-note at the beginning of a term of the Supreme Court, is this statement: "February 3d, 1812. Present, Washington, Livingston, Todd, Duvall, Story, Justices. The Chief Justice did not attend until Thursday, February 13th. He received an injury by the oversetting of the stage-coach on his journey from Richmond." This is a statement of a not important fact in itself, but how vividly it suggests to the mind a picture of the time of Marshall's coming to the Supreme Bench one hundred years ago, and the contrast between the condition of our country then and now — a contrast which no pen or tongue can adequately describe. Then there were sixteen States, having a population of less than six millions. It was a time of the whipping-post, the branding-iron, and imprisonment for debt. It was a time of dirt roads, of stage-coach and horseback travel, and of freighting by the Conestoga wagon. The steamboat had just come to stay, and the turnpike road was receiving its first attention.

A written Constitution had been adopted, but no two people seemed to understand it alike; and even many of

its leading framers, advocates and defenders differed diametrically as to its fundamental theory. A National Government had been set up and organized, but an old inherited habit of State pride held dominant sway over the minds of the great majority of the people. State lines, like barbed-wire fences, held the people fenced off to themselves in a condition of state isolation, so that there was no cohesive force between the different parts of the country — no unity of feeling, no national impulse, no national public sentiment. But how the heart is thrilled with patriotic pride when we turn from the picture of those old days and contemplate the condition of our country to-day as it goes careering to its destiny of the primacy of the world.

We face the problems and enter upon the task of the new century blessed with the possession of the two masterful elements of success: the material power of a great Nation and the moral power of a united people.

Who shall account for the wonderful changes and explain the marvelous development a century has brought about? Many great forces and influences have entered in and performed their office. Here was a grand opportunity for an onward sweep of civilization. The world and the time were ripe for great things. But what shall we say was the central leading force, the pre-eminent fact which has formed the basis for this advancement in our material greatness, which the century has witnessed?

I believe it will be conceded by all practical minds that our system of commerce, and especially of our internal or interstate commerce, stands as the pre-eminent and most potent factor contributing to this result.

From what small beginnings and to what wonderful proportions has that commerce proceeded. And just as



our internal commerce has grown and flourished, so has our country moved upward in material strength and moral grandeur. With it there is activity and life; without it there is stagnation and decay. Its effect has been to bring the man of Maine and the man of Oregon into close fellowship as neighbors, friends and co-workers. It has promoted unity of interest, unity of purpose, unity of patriotism; and has aided mightily in the growth among us of a national public sentiment whose decrees are swift, sure and just; and by the operation of which, notwithstanding we have in form a Federal Republic, we have in substance all that is beneficial in a pure democracy.

Many things were of vital importance to the development of our internal commerce to the point of its present magnitude. The first of these was that it should be unfettered and free. That no State or agency of a State should be permitted to obstruct it or hamper it by the imposition of burdens or restrictions. Its very life was involved in its freedom from State interference. It was claimed that the power to regulate commerce between States existed in the States concurrently with Congress; further, that the power to regulate such commerce as vested in Congress was limited to the matter of articles of traffic; and that the instrumentalities of carrying it on, the great highways of it, in so far as they lay within a State, were subject to the control of that State.

But when this great question came up to Chief Justice Marshall, how grandly he cleared the field. By his decision he settled it that the power to regulate interstate commerce was vested exclusively in Congress; that this power went, not only to the matter of articles of traffic, but to all instrumentalities by which commerce is carried on, including the highways and vehicles on and in which it

is conveyed. He further gave to commerce a comprehensive significance, applicable, in its ultimate analysis, to all forms of transportation, travel and communication.

To the successful upbuilding of this commerce it was also necessary that a currency be provided, stable in quality, convenient in form and flexible in volume, sufficient to effect all desired exchanges. This, Congress undertook to do by the establishment of a national bank with power to provide such a currency. To reach its highest utility, and accomplish the purpose for which it was designed, it was equally essential that this system of banking and currency should be free from State interference. But it was claimed that Congress had no power to create a national banking system or authorize such a currency, and that the States might tax it out of existence.

This great question coming up to Marshall for decision, he cleared the field of that dangerous obstruction, and settled it that Congress had power to create national banks, and through them furnish the people a paper currency for all the needs of commerce. And then and there he laid the foundation on which Congress, in after years, was enabled to provide the sinews which preserved the life of the Nation.

To meet the demands of a growing commerce, our unrivaled system of railroads has been created and brought to its present state of perfection. Without these, who cares to conjecture what our condition as a people and our position as a Nation would be to-day? This tremendous enginery of civilization never would have been provided, except by the great aggregation of capital through the instrumentality of corporate organization. Such corporate organization, adequate to enterprises of such vast magnitude, never could have been secured, ex-

cept upon faith of absolute certainty that a corporate charter meant the investiture of an inviolable legal right. But it was claimed that a corporation, being created by a charter granted by a State, was simply an instrumentality and agent of the State to carry forward its own State policy; and that the management of the powers delegated to the corporation might at any time be assumed by the State itself. This great question also came up to Marshall for settlement, and he settled it by a decision that the grant of a corporate charter, where property interests are involved, is the vesting of an inviolable contract right, which is beyond the reach of legislation to destroy or to impair. And he then and there laid the foundation of the most marvelous advance in productive enterprise the world has ever witnessed.

The United States could not have reached its present position of population, wealth and strength without the power to acquire additional territory. But it was claimed that the General Government was without power under the Constitution to acquire territory. Jefferson, who as President negotiated the great Louisiana Purchase, declared that his action in that transaction was unconstitutional. This question in course of time coming up to Marshall for decision, he established the broad doctrine that the government had certain inherent powers of sovereignty. That it had power to make war and peace; and to enter into treaties; and necessarily had power to acquire additional territory, either by conquest or treaty. And soon thereafter the panorama of our national domain unrolled to the Pacific ocean.

But underlying all these contentions, kept to the front during all the progress of these various controversies, constituting the pivotal center, around which they all

revolved, and overshadowing all in the peril it threatened to the structure of our government and the permanency of our institutions, was that bolder and deeper contention, that notwithstanding the Constitution was the supreme law, and each State subject to it, yet that each State was sovereign within itself, and had never surrendered the right to construe the Constitution for itself; and under the sanctity of its character of sovereign State could determine for itself the measure of its duty and the limits of its own powers as well as those of the General Government; and could apply a corrective to unconstitutional action of the government, even to the extent of withdrawal from the Union, whenever it deemed its rights invaded. This great question of questions came up to Marshall to be determined, in so far as judicial decision could determine such a question.

In a series of decisions which, for luminous statement, cogency of reasoning and unanswerable demonstration, stand unrivaled in all the realm of judicial literature, Marshall made it clear that the United States is a Nation of People, and not merely a Nation of States; that within the sphere of the powers conferred it is supreme; that it is the sole judge of the extent of its own powers; that it has, as part of its organization, a department and a tribunal whose province and duty it is to construe for the Nation its own Constitution, and its laws and treaties made thereunder; that this department is the judicial power of the Nation; that no part of this power can be exercised by the States, nor can the States lawfully resist the execution of the laws of the Nation so interpreted.

But, although the court could finally construe the Constitution and pronounce its judgment, yet in cases involving great fundamental questions such as these, the court

was powerless to enforce its own judgments. It could furnish to Webster the broad pedestal from which he could hurl the lightning of his time-enduring oration. It could inspire Freedom's mighty host with the conviction, sure as the foundations of faith, that their home was a Nation capable of self-preservation; yet it remained with the people to enforce the judgment. Said Marshall: "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme irresistible power to make and unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it."

Solemn, glorious judgment! Solemn, awful warning! And when, in the fullness of time, after four years of bloody strife, our renowned Chief Deputy, Grant, with his posse in blue, acting under our immortal High Sheriff, Lincoln, took into his custody the goods, chattels and effects of the late lamented Confederacy, and forever abated the nuisance State Sovereignty, he executed final process on the judgment rendered by Marshall.

The appointment of John Marshall to be Chief Justice, coming at the particular juncture of affairs in which it was made, was so opportune as to seem to have been providential. Only two years prior, what were known as the Resolutions of '98 were adopted by the legislatures of two States; declaring that the United States government was created by a compact between the States; that it was not made the exclusive or final judge of the powers delegated to it; that each party to the compact, the Government and the State, had an equal right to judge



for itself as well whether there had been an infraction of the Constitution as of the mode and manner of redress therefor. Thomas Jefferson, who drafted and inspired the adoption of these resolutions, was to become President at the end of a month. It is certain that if the then existing vacancy had not been filled during that interval, Marshall could not have been appointed, nor could any man holding to his theory of the Constitution; but that some man holding to the doctrine of State sovereignty and strict construction of the Constitution would have been appointed.

If it were possible to do so, it would prove an unprofitable service to attempt to lift the veil and penetrate the mystery of what might have been, if it had fallen to Thomas Jefferson to make that appointment.

The heart is sufficiently stirred by the contemplation of the things we see and know. We know that John Marshall became Chief Justice. We know that our Nation has been preserved, and our country grandly lifted up. We know that the theory of the Constitution and national character of the government for which as Chief Justice he so firmly stood has prevailed. We know that the constitutional judgments which he delivered were so armed in truth, so fortified in right, that local self-interest, political rancor and rebellious war have not prevailed against them. We know that the rule of our government, energized by the principles which he judicially established, has been benignant, humane, just and inspiring. We know that beneath the ægis of its protecting wings there has been brought together and nurtured, assimilated and solidified a free, happy, advancing, aggressive, irresistible American people. We know that it was the splendid spirit of Americanism, incarnate in the constitu-

tional judgments of the Chief Justice, John Marshall, that gave to the great white stone of our commercial greatness, hewn from the firm-fixed adamant of our nationality, its original impulse; and kept it rolling with the course of Empire, across the stored-up treasures of the Alleghanies; across the wide-reaching garden of the Mississippi; across the mineral riches of the Rockies and the gold-laden ledges of the Sierras; down the vine-clad slopes of the Pacific; until now it has reached the shores of the China Sea, where, luminous with the light of Liberty, Justice, Peace, it keeps watch and ward over the land of the Celestials.

Our America erects no Pantheon of marble and bronze consecrated to its heroes, statesmen and sages. The great deeds of these are left to be inscribed upon the hearts of the generations as they follow one after another. In this bright temple of our veneration, inscribed high over all others for the service they have rendered to our institutions, we read the names, Washington the Founder; Marshall the Finisher; Lincoln the Preserver.

An address was delivered by John D. Milliken<sup>1</sup> on the subject of "The Early Days of Marshall," in which he said:

**Address of John D. Milliken.**

Our hearts swell with exultant pride and are aglow with admiration as we contemplate the glorious achievements of Grant, Sherman, Sheridan, Thomas and their comrades in arms, whose climax was reached in the surrender of the brave Confederate chieftains and their hosts at Appomattox, after the most memorable struggle of

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<sup>1</sup>The editor regrets that want of space precludes giving the addresses of Judge Milliken and Judge Cunningham in full.

modern times. We may rejoice with greater joy at the grander peace and a more united country which resulted from their sacrifices. Our hearts may well be filled with gratitude as we view the life, character and marvelous accomplishments of the commander-in-chief of these heroic men, the new giant who came forth from the heart of the great people in 1861 filled with their hopes and aspirations, his heart radiant with the fire of patriotism which burned in their souls, his conscience stung with the wrongs which the blinded zeal and misguided passion of some had led them into; he of abiding faith and unfailing hope; he whose name we revere, and whose memory we cherish above every other, Abraham Lincoln.

I would not pluck a laurel from one of those immortal brows; I would not erase one word from the imperishable records of their glorious deeds, but truth and justice demand, and the revelations of history clearly attest, that the awful tragedy culminating at Appomattox was the victory of John Marshall as well as that of Lincoln and Grant. Their deeds were the maintenance, by physical force, of the principles which Marshall had established by the power of reason under conditions requiring an equal degree of courage. During the fearful ordeal of the four years through which the divinely appointed Lincoln led us, while people were groping in darkness, with imperfect vision and beclouded conception, he, with a keen insight, or rather a prophetic vision, grasped and relied upon those principles enunciated by Marshall, in a degree which we have heretofore not realized. In his inaugural in 1861 he quoted, in support of his position, the burning words of Marshall: "The government of the Union is a government of the people; it emanates from them; its powers are granted by them and are to be ex-

exercised on them and for their benefit. The government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land."

An address was also delivered by Edwin W. Cunningham on "Marshall as the Expounder of the Constitution."

**Address of Edwin W. Cunningham.**

John Marshall was a great judge. His was an analytical mind that grasped generals and laid bare the details. He had the prescience of a prophet as to the effect of political principles under discussion. He saw the end from the beginning. His breadth of view was that of a statesman. His opportunities were great. He stood at the parting of the ways. His hand was on the tiller as the vessel left the harbor for an unknown voyage. But great as were intellectual gifts, great as were intuitions and opportunities, none of these nor all of these were sufficient to make of him the great judge he was. Over all these and greater than all these, giving significance and value to all, was his sublime moral purpose. The political effect of a given construction of the Constitution was an important matter for consideration; but the question of the morals of the course was greater. His technical knowledge of the law and of precedents may have been limited, or at least lightly esteemed; but his sound judgment and comprehensive sense of right, both legal and moral, were most profound.

Marshall often trod in new paths. No one had gone before him. Unlike the moderns he was following no man's footsteps. Precedents, right or wrong, furnished no guide. Upon such an unknown way, his pole-star was

the right. He followed the voice of duty out of the maze.

It was this sense of right and justice that led him to a correct determination of the questions arising in the Dartmouth College case, upon that clause of the Constitution forbidding the impairment of the obligation of contracts by the acts of any State. I once heard, in a paper read before this body by an eminent author and jurist resident in a neighboring State, the position taken by the Chief Justice in that case seriously inveighed against, because under its protection corporations had grown to alarming and menacing proportions. The criticism was unwarranted. Common honesty, as well as the letter of the Constitution, required the interpretation given. To take away a right from a corporation by judicial enactment, only opens the way for a similar larceny of an individual's right when occasion shall arise. Let courts conscientiously keep within their sphere, while legislatures as carefully remedy the wrongs within theirs.

One hundred years ago, when Chief Justice Marshall became the dominating spirit of the United States Supreme Court, very many of the principles now recognized as at the foundation of our law were unsettled. And practically all of that body of law growing out of the application of the recently made Constitution, to the theretofore independent sovereignties composing the new Union, was unknown. The Revolutionary War had not far progressed when it was clearly disclosed what a rope of sand the Articles of Confederation were. The wisest in all of the colonies soon saw that if popular government was to be made permanent on these western shores, and a government established sufficiently strong to repress internal schism and withstand external force, the Union



must be laid on other lines than those found in the Articles of Confederation.

By the adoption of the Constitution, the avowed objects of which were "to form a more perfect union and to secure the blessings of liberty to ourselves and our posterity," the United States took on the character of a National Government, and to some measure lost that of a factitious league. Although the period of gestation had been some twelve years, the colonies were not fully prepared for the birth of the Constitution.

After reviewing and commenting upon and giving illustrations of the style and character of Chief Justice Marshall's opinions on constitutional questions, the orator concluded:

Enough has been quoted to show the virility of thought and profundity of grasp with which the great Chief Justice came to the most important questions which ever confronted the government. I say the most important, for suppose that contrary views of these great constitutional questions had been taken, not strength and coherency enough had been left to the General Government to have survived to 1861, to say nothing of its weathering the mighty shock of Civil War.

As great men as Chief Justice Marshall have adorned the Bench in this and other lands, but none have met so great opportunity. The work he did was unique and extraordinary in its character, and most momentous in its results. The views of the nature of the Constitution which he entertained, and built into the fabric of our growing government, has enabled it to withstand the shock of war and the peril of growth. John Marshall was not only the expounder of the Constitution, but the conservator of the Nation.

**EXERCISES AT LAWRENCE.**

A celebration was held at the University of Kansas, which was well attended by the faculty and students of the University, members of the bar, and other citizens. An address was delivered by Hon. J. G. Slonecker, of Topeka, from which are taken the following extracts, all that space permits, relating to the judicial services of Marshall:

**Address of J. G. Slonecker.**

Without the energy, skill, devotion, yea, the lives of a host of men, the American Revolution would have been merely a rebellion. All the men who took part in that great struggle are entitled to honor and praise, but above all others stand three men whose names should be revered for all time. They are Washington, the soldier who led the people to victory, and as their first President won their undying regard; Hamilton, the soldier who was by Washington's side in war, and who in peace, by his clear vision of the purpose of government, as well as of the means necessary to the end, and by his constructive ability, did more than any other to make this a nation in all the name implies; and Marshall, who too was a youthful but valiant soldier, and to whom it fell later to interpret the Constitution and lay an enduring foundation for the judicial system of the Union.

We willingly pay renewed honor to Washington annually. Some years ago, on this very spot, an able, discriminating and eloquent tribute was paid to Hamilton by the late John C. Ridpath, and my regret is that some one equally as competent as he is not here to-day to do something like justice in a fitting manner to the memory of John Marshall; but as one of his greatest eulogists

has said, "It is the consolation of the humblest, as it ought to be of the most gifted, of his eulogists, that the case of this illustrious man is one in which to give with simplicity the record of his life is to come nearest to a resemblance of the great original."

To give then with simplicity the record of his life is my mission.

The orator here sketched the public and private life of Marshall down to the time of his appointment as Chief Justice, and then proceeded as follows:

We have now come to the crowning part of Marshall's career. On the 31st day of January, 1801, he was appointed Chief Justice of the Supreme Court of the United States, and one hundred years ago to-day he took his seat on that Bench. At this point it may be well to look briefly into the situation of the country and the standing, position and duties of the Supreme Court when he was appointed.

The Constitution had been the subject of bitter discussion before its adoption. The hostility of many of its opponents did not cease even then. Its administration was watched with jealous eyes and criticised with severity upon the smallest opportunity. Many prophesied its speedy failure, and the wish appeared to be father of the thought. The machinery of the government was new. It was something of an experiment. The adjustment of part to part was imperfect and friction was the inevitable result. Human nature was the same then as now, and those who had been defeated in their efforts did not hesitate to embarrass those who were successful. To that was added the genuine, sincere belief of many patriots that the freedom of the people was really endangered by the power given to the General Government, and that the

rights of the States would be jeopardized by this supremacy. They insisted vehemently that the General Government should have no power not expressly conferred by the Constitution in words, and they would have even given a narrow and technical meaning to the words. A written Constitution such as ours was a new and untried feature, and there were no precedents to guide the court. Up to this time very few questions respecting constitutional powers and limitations had as yet been submitted to the Supreme Court, although they had been discussed elsewhere. There was a wide difference of opinion as to its construction and interpretation. As has been said, the Constitution was adopted to confer powers and not to define them. Such an instrument is necessarily complex, and it is no reflection on the wisdom of its makers to say that it needed and still needs interpretation. As a distinguished Kansas statesman has said: "We revere the Constitution, but we are not afraid of it."

Upon the Supreme Court, then, as the ultimate tribunal, rested the duty of determining the functions, powers and limitations of the executive, legislative and judicial departments of government as expressed in the Constitution and their relations to each other—even the rules of interpretation remained to be determined by it. Under such circumstances to have erred might have been fatal to the whole system.

At such a time and to such a responsibility was John Marshall appointed. To be called to such an emergency and to be equal to it, to achieve so great a distinction, is a greater eulogy than any pen can portray. That eulogy belongs to John Marshall.

President Adams may well have said that his gift of

John Marshall to the people of the United States was the proudest act of his life. Looking at it from our standpoint and at this distance of time, it was fortunate that the vacancy in this office occurred when it did, so that Adams had the opportunity to appoint John Marshall, and that it did not come later when a strict constructionist would doubtless have been appointed, which event might have changed the entire history of the country. It is fortunate, too, that he was spared for thirty-four years to lead such a tribunal, sustain the supremacy of the Constitution, establish the principles for its interpretation, and assert and maintain the majesty of the law. Marshall was well adapted to the duties and responsibilities before him. There was well developed in him the creative faculty, or, as I choose to call it, an inspiration of constructive law. For so clear a vision of the principles of government and of the powers of the judiciary is almost supernatural. As was said of an ex-Chief Justice of this State, "He was honest by instinct;" and by that is meant not merely, nor even chiefly, financial honesty, but that comprehensive sense of right which comes not by reading or study, but is inherent and involuntary. His friend and long-time associate, Judge Story, said of him, "that he possessed an uncommon share of juridical learning would naturally be presumed from his large experience and inexhaustible diligence; yet, it is due to truth, as well as to his memory, to declare that his juridical learning was not equal to that of many of the great masters in the profession living or dead, at home or abroad, but it was a matter of surprise to see how easily he grasped the leading principles of a case and cleared it of all its accidental incumbrances; how readily he evolved the true points of the controversy, even when it was manifest that he never



had caught even a glimpse of the learning upon which it depended. Perhaps no judge ever excelled him in the capacity to hold a legal proposition before the eyes of others in such various forms and colors.”

It is a matter of congratulation, then, that the President selected for this important duty a man who was able in every respect to lead the court and to maintain its dignity, power and supremacy. We should be thankful that his choice did not fall upon some person who was colorless politically, whose views on public questions of moment were not known, and whose political and professional opinions, and standing even, was unknown outside of his own locality, even if known there.

It would be impossible now with the limited time at my command to go extensively into his career as Chief Justice. The result of thirty-four years of labor recorded in thirty-two volumes of reports is too extensive for review now. We all recognize, however, that his decisions in relation to international and constitutional law are the ones which have given him the most fame and the ones in which we are most interested.

It will hardly be contended now that the opinions of Marshall are not entirely correct, and it was only when they were departed from that disasters came to the Union. As judge, Marshall considered it his duty simply to find and declare what the Constitution meant, not what it might possibly or even desirably be construed to declare.

Jefferson, with his views of the rights of the States, might regard it a duty to make the Constitution as narrow and restricted as possible. Hamilton, with his views of the importance of a vigorous, powerful government, might feel that it should be made as broad and comprehensive as its words would admit. Marshall, however,

as a judge, must be impartial, and it was his duty to determine whether the Constitution said one thing or whether it said another; but while he was impartial it must not be imagined for one moment that he was colorless. The man who had fought during the war of the Revolution, who had honestly defended the Constitution and the power of the General Government as often and vigorously as he had done, must have opinions. He could not divest himself of those opinions because he was made judge. The fact that he believed that the government must have power or else it must dissolve, undoubtedly would incline him to construe the Constitution as giving the power necessary to hold the government together. He believed that "united we stand and divided we fall," and, so believing, after that manner he construed the Constitution. There is no doubt now that his decisions were wise and extremely fortunate for the Nation. Too much power has not been given to the General Government, even under his construction, and many wish that he had gone even farther than he did.

I do not mean to give all the honor to Marshall. He would be quick to disclaim such praise. His associates were men like himself, of spotless integrity, of devotion to the Union and of unquestionable ability, but they would be the first to concede that on constitutional and international questions Marshall was the leader of the court. From the vantage ground of posterity we see it was exceedingly fortunate that this was true and that the foundations of our jurisprudence were laid wide and deep and secure. If a man of less breadth had been appointed, these foundations, although equally deep, might have been too narrow; and as the superstructure of the judicial department necessarily grew and extended with the

growth of the country, and as the number of States increased, the foundations might not have been wide enough. What is now a harmonious structure might have become top-heavy. The center of gravity might have shifted, and the whole fabric might have become insecure, might even have fallen, unless propped by some extra-constitutional contrivance. To Washington, Hamilton, Jay, Marshall, and to other such men of their time, is due what is now recognized to be the necessary supremacy of the Federal Government. By virtue of Marshall's comprehensive treatment and interpretation of the Constitution we have in this country, what exists nowhere else, a perpetual, never-lapsing, never-dying sovereignty — the sovereignty of the American people.

The difficulty of the questions which confronted the Supreme Court must not be overlooked nor underrated. To create a system of jurisprudence different from any in existence, to establish proper rules for its regulation and define its powers, calls for intellect of the highest order. It requires not merely nor chiefly learning in the law; it requires not only clear vision, it requires that reach and breadth of mind, that far-sightedness, that is scarcer than any other quality. In these rare qualities Marshall was pre-eminent. He was somewhat negligent about his person, and even Judge Story, who was so strongly his friend as to be prejudiced, has remarked that he was plain but neat in his attire. When we remember the story about him which appeared in one of the school readers when I was a boy, which recited that a plain old gentleman drove up to a country tavern in a gig the shafts of which had been broken and tied up with hickory withes; that his knee buckles were loose and he was negligent in his dress; and when we recall that it

is told of him that when he went to call on a new sister-in-law who had never met him, she mistook him for the butcher, we are quite prepared to believe some of his personal acquaintances who said that when he was beyond the watchful eye of his wife he was careless in his dress and even slovenly. But there was nothing slovenly about his manner of thinking. His shoes might be muddy, but his thoughts were as clean and as pellucid as the water of a mountain spring; his knee buckles might be loose and the edges of his coat might be frayed, but there was nothing loose in his logic, and his reasoning showed no sign of unraveling; the frills of his shirt might be soiled, but there was no stain on his honor.

The orator, after briefly referring to *Marbury v. Madison*, the trial of Burr, and to the characteristics of Marshall as a man, and to his domestic relations, concluded as follows:

So ends this brief and imperfect relation of his long and useful life.

What a full, complete, well-rounded life it was! Soldier, lawyer, legislator, member of the Convention that on the part of Virginia adopted the Constitution of the United States, minister to France, member of Congress, Secretary of State, member of the Virginia Constitutional Convention, author of the *Life of Washington*, Chief Justice of the Supreme Court of the United States for thirty-four years, rendering honorable service in all these positions and distinguished services in most—the dutiful son of proud parents, the affectionate, devoted and faithful husband, the considerate, indulgent but watchful father, the warm and loyal friend,—he was touched by no breath of scandal either of official conduct or personal character.

## STATE OF NEBRASKA.

On the 4th day of February, 1901, under the direction of the Omaha Bar Association, a public meeting was held at Omaha to commemorate the character of Chief Justice Marshall.

Invitations to be present were extended to General Fitzhugh Lee, U. S. A., and his Staff, the Governor and State Officers, the two Houses of the Legislature, the Judges of the Circuit Court of the United States, the Supreme Court of the State, and the District Court of the County, and the Mayor and Council of the City and the County Officers.

These officers and public bodies accepted these invitations, and the Legislature and the Courts adjourned for the day.

Mr. Timothy J. Mahoney, President of the Omaha Bar Association, presided. He presented the Right Reverend Arthur L. Williams, D. D., who offered prayer.

In a few appropriate words he introduced Hon. James M. Woolworth, who delivered the following address:

### Address of James M. Woolworth.

It was an interesting conjunction when, on this day one hundred years ago, the Supreme Court of the United States for the first time sat in Washington, and John Marshall took his seat as Chief Justice. It does not seem to me altogether fanciful to connect these events, and suppose that in a way they have relation, each giving



illustration and dramatic interest to the other, and the two forming an epoch in the history of our country.

The seat of government had been first at New York and afterwards at Philadelphia; but these locations were temporary. The Constitution provided that the capital should be in a district under a special and peculiar jurisdiction. There was a significance in planting and building a capital for the Nation in a district under its exclusive government. Except in the limited area of this peculiar territory, a dual system obtained; the State Government and the Federal Government occupying together the same domain and holding a divided sway over every one of the citizens. The State was the elder historical fact. It was the colony, only it had become free and independent. The traditions of generations and a habit of obedience gathered about it. Every man felt that he owed it a fealty and was conscious of its presence in all the affairs of his daily life; for it guarded his rights, privileges, franchises, liberty and property. The consequence was, that there was a familiarity with the State and its functions, faculties and authorities.

On the other hand, the Union was a new creation. Loyalty and affection, always things of growth, had not had time to attach themselves to it. And besides, so long as it was within the confines of a State, dependent upon it against the assaults of popular clamor, and without capacity for the display of tokens of its sovereignty, the Nation was a political conception not easily apprehended by the popular mind. But when a district was set apart in which the national sovereignty had undivided sway, when Congress and the Executive had established themselves in Washington, and at last the Court, the last of the great departments to remove there, began its sittings in the new

Capitol, the work was completed and the plan of the Constitution was realized. Then the spectacle and personality of the Nation was known and seen of all men; then were displayed the insignia and symbols and outward and visible signs of the august, imperial and powerful Sovereign; then was presented to the eye of the citizen and the apprehension of the world the majesty of the American people.

When you realize the conception of a National Capital personifying a great Nation, you will understand the significance of the event when the Supreme Court completed the removal there of the administration in all its departments.

The accession of Marshall to the office of Chief Justice was also an event of significance. With him began the process of unfolding the deep meanings of the Constitution, which went on under his hand for thirty-four years of his life; at the close of which his countrymen were able to read in the provisions of that extraordinary instrument, and understand with an informed intelligence, and take to their hearts with exulting passion, the fact that these States are a Nation, now and forever, one and inseparable. That was his great work; for that, all generations that have come and gone since his day have paid, and all the generations that shall come hereafter, so long as our system of government shall continue, will continue to pay to his memory the homage of their veneration. Thus the two events which transpired on this day one hundred years ago have each a significance which associates them intimately together.

The limitations of this exercise will not permit a full account of the life of this remarkable man; and not only the limits of the hour at my disposal, but the special and

particular aspects of the character we are to contemplate, withdraw from our attention many passages in his career. This day is the anniversary, not of his birth, but of his entrance upon the office of judge. It has been set apart all over the country for the commemoration of his character as a magistrate rather than as a man. At the same time, in order to understand his character as a judge, we must know something of the experiences and influences by which his mind was molded and his opinions formed.

John Marshall was born at Germantown, in Fauquier county, Virginia, on the 24th of September, 1755. His father, Thomas Marshall, was a man of vigorous mind and strong and ardent nature. The son often said that his father was in every way superior to any of the children. He was an officer in the Revolutionary army and was in many engagements, and was a loyal friend of Washington. As a boy, John Marshall was very much of a boy. Physically muscular and vigorous, he was fond of out-of-door life; he hunted, trapped, rode, raced and pitched quoits. He had a singularly happy temperament. With high animal spirits, physically and morally brave and resolute, he loved wit and drollery and tricks and games. His laugh was joyous and infectious. He was free from self-consciousness; he did not seek his own, nor dispute the claims of others; and his manners and speech were simple, unaffected and unpretending. He always had remarkable personal magnetism. His fine, genuine nature drew others to him without his knowing it and without their caring why, so that he always had the instinct and force of a leader. He was not inclined to study and was naturally indolent and full of day dreams and romances.

He early learned that the quarrels of the colonists with

the Crown and Parliament must lead to war. At the age of eighteen, fired by military ardor and patriotic emotion, he anticipated what was at hand and applied himself to acquiring the elements of military knowledge. One day a company composed of the young men of the county was ordered to report at a distant point. Marshall was there; as soon as he appeared on the field the men clustered around him, his acquaintances to greet him, and strangers to hear the news from the North. He told them that he had come to meet them as fellow soldiers who were likely to be called upon to defend their country and their own rights and liberties; that there had been a battle at Lexington, in Massachusetts, between the British and Americans, in which the Americans were victorious, but that more fighting was expected; that soldiers were called for, and that it was time to brighten their firearms and learn to use them in the field. He then told them that if they would fall into a single line he would show them the new manual, for which purpose he had brought his gun. The sergeants put the men in line and the young officer presented himself in front to the right. He went through the manual exercise by word and motion, deliberately pronounced and performed, and then had them imitate him and repeat the lesson. The young fellows then gathered in a circle around him and he addressed them for an hour, telling them of the stirring events in the North, as far as they were known, that he was going to enlist in a battalion then forming and expected to be joined by many of his friends. The day closed with athletic exercises, in which he engaged with spirit and great glee. Very soon he was promoted captain and with his company went off to the wars. He was at the battles of Brandywine, Iron Hill, German-

town and Monmouth, and was in the covering party at the assault on Stony Point and the brilliant affair at Paulus Hook. All through his services he was at the post of danger. I must not follow him in his adventures. I have in the fewest words possible adverted to some of his services in the field, for the purpose of leading you to a most interesting passage, in which, more perhaps than in any other experience, his opinions were molded and his character impressed.

He was at Valley Forge in 1778 and shared with his men the privations, hunger and cold of that awful winter. His patience in bearing his own sufferings and his cheery nature held up the drooping spirits of the soldiers. He led them in all manner of diversions, entertained them with tales of adventure, drew them into labors which kept their blood running, and into exercises which fitted them for the field. He was the life and spirit and joy of the camp. All loved him. They brought their differences to him and he composed them. They confided to him their troubles and he returned to them the tenderness of his sympathy and the strong support of good counsel. He was judge-advocate, and in that office was not only the prosecutor, but often the protector of the accused. His duties from time to time brought him to headquarters, and he often pleaded to Washington the dismal condition and cruel suffering of the soldiers in extenuation of offenses of which they were accused and sometimes convicted; and he often carried back a mitigated sentence with some strong word of courage or reproof from the General. He attracted the attention of Washington, and formed a warm friendship with Hamilton. They admitted him to a familiar intercourse and to their discussions of the un-



happy conditions of the country, the defects of the Confederation and its inadequacy to the conduct of the war and the affairs of the country. We may well suppose that he knew something of the contents of Washington's letters to Congress and the great men of the country, setting forth in terms of pathetic urgency the necessity of fraternal sentiments in order to the ultimate success of our arms. It is certain that at that early day his mind became imbued with the sentiments and opinions of his Chief, and afterwards, throughout the war, all that he saw of the course of affairs and all his experiences and reflections confirmed and strengthened those sentiments and opinions. And thus almost from his boyhood the one political doctrine which pervaded his judgments was that these discordant States must be made one people, one Nation, to which each must submit to be subordinate.

We come now to the second period in Marshall's life. It covers the time from his admission to the bar to his appointment as Chief Justice. It suits my purpose to speak of him as a lawyer and a public man separately, better than to follow in chronological order the events of his life. When little more than a boy and before he was exposed to the distractions of military service, he began the study of law; and while he was not at that early age very diligent, it was something that he understood to what he was to devote his life. In brief intervals of military service, he returned to his studies with increasing interest; and when in 1781 he resigned from the army, he repaired to William and Mary College to attend a course of lectures on law by Chancellor Wythe. At the age of twenty-five he was admitted to the Bar. He practiced in Fauquier county two years, and then removed to Richmond. He was no stranger in that

beautiful city. As a member of the Assembly from Fauquier county he had spent a session at the Capital, and had attended the sittings of the courts there. His ardent social nature drew him into a numerous acquaintance. And the society of Richmond was most congenial. It was unconventional and uncommercial, cordial, genuine, courteous and hospitable to all, but welcoming with warmth one of his social gifts. His brethren of the profession already knew or quickly recognized his gifts, and extended to him the right hand of fellowship. Very soon retainers flowed in, and he had opportunities to show what stuff he was made of. His grasp of legal principles, his clearness of statement, his powers of reasoning, his intuitive perception of the right time and the right way to do the thing to be done, soon secured him an enviable reputation and a large clientage. It was not long before he found himself beside Patrick Henry, Alexander Campbell, Botts, Randolph and other leaders of the bar. In ten years he was retained in the most celebrated cases and led on their trial. A distinguished Frenchman wrote of him that he was the most esteemed and celebrated counselor of Richmond, and ranked highest in the public opinion of the Capital.

The question has been asked whether Marshall was deeply read in the technical learning of the law. The same question has been asked of Webster and others who have at the same time filled the courts and the Senate with the splendor of their performance. It is undoubtedly prompted by the difficulty men have in understanding how the graces of popular speech can consist with the severities of legal argument. The suggestion in Marshall's case is supposed to find support in the fact that neither in his arguments at the Bar nor in his judicial

opinions did he fortify his conclusions or illustrate his opinions by the citation of many cases. But that is a very delusive test. The frequent use of authorities is very apt to become a sort of mechanical contrivance which a common hand may operate. It is quite another thing to master principles by deep study of judicial judgments and learned authors, and acquire a familiarity with them so that you live with them in a sort of comradeship, and become apt in taking their doctrines as postulates, and reasoning from them to a sure, certain and obvious conclusion. He who has done that, need not tell you what others have said; but you feel that with my Lord Coke, he rejoices "in the gladsome light of jurisprudence."

There is another reason for accounting Marshall learned in the special, precise and copious learning of the law. From his admission to the Bar to his accession to the Bench, his joy and ambition was his profession. Again and again, he was withdrawn from its excitations to public duties, but never of his free will. With what reluctance he yielded to the call of his neighbors, to the insistence of great men, among whom was Washington himself, and the demands of imperative exigencies, and with what delight and eagerness he returned to his retainers and conferences and arguments and trials! No one ever followed and enjoyed the profession who has not entered into the secrets and intents of the science of law. Men may fritter their lives away and care nothing for the deep things of nature, but none will toil as a great lawyer must, who has not become familiar with the fundamental principles, the historical sources, the modes of reasoning and the evidences of the truths of his profession.

In order to complete our account of the experiences which contributed to the development of the character of the great Chief Justice, it remains to speak of his performances in the field of statesmanship. He was repeatedly elected to the State Legislature. I pass by what he did there, and hasten to speak of his splendid service in the Convention of Virginia which was called to consider the Federal Constitution. It met at Richmond on the 2d of June, 1788. Nine States, the number necessary to put the new scheme of government in operation, had given in their adhesion to it, so that the refusal of Virginia could not accomplish its defeat. She was left to make her choice between isolation and the Union. It was felt throughout the country that, while it was not necessary, it was of the first importance that she join her sister States in the Union. She was the most populous and wealthy of them all, and geographically held a central position among them. She numbered among her sons many of the eminent men who had taken a conspicuous part in promoting the cause of independence; and within her borders was the home of Washington, whose personality was necessary to the success of the experiment. Everywhere the anxiety was intense in watching the course of opinion in Virginia.

The convention was understood to have a majority against the Constitution. Patrick Henry led the opposition to it. The Masons, Graysons and other delegates of great name and influence joined him. With impassioned eloquence, Henry inflamed the minds of the members; he stimulated their fears of a government of tyrannical powers; straining every provision and clause of the instrument so as to make it appear capable of authorizing and inviting usurpation and oppression; likening the

system of government to that of Great Britain, from which they had escaped after long years of war and by the expenditure of so much blood and treasure; and denouncing the whole scheme as an ambuscade which would destroy the States and swallow the liberties of the people without notice.

To these violent denunciations and the heated passions which they aroused, James Madison, John Marshall and others opposed themselves. They appealed to the history of the war in support of their views; they recounted the exigencies in which the Confederate Congress had failed to support the army during the war, and, after peace was proclaimed, to provide for the public debt, care for the public credit, and maintain the dignity of the government; and on the other hand they explained the provisions of the Constitution and showed that they were contrived with consummate wisdom for the protection of the rights of the citizen and the just powers of the States. They brought to the discussion the copious resources of disciplined wisdom and cogent and powerful reason. Marshall declined to be drawn into every discussion and reserved his strength for the most vital questions. He spoke three times on the power of taxation vested in Congress, the power of the Executive in command of the militia, and the power of the judiciary. He discussed these questions with consummate skill and irresistible logic. His discourses, free from all appeals to passion, addressing the good judgment of the delegates, moderate in dealing with the arguments of his adversaries and always giving them credit for patriotic emotions which he knew animated his own breast, carried conviction, disarmed his adversaries and elicited their admiration and approval. The contest was severe; it



lasted twenty-five days; no one could foretell the issue; but when the vote was taken, by the narrow majority of ten the Constitution was approved and adopted.

The country had stood by looking on with intense anxiety; it drew its breath when the result was known, and broke out into every demonstration of joy. What Marshall had done to bring the discussion to a happy issue was known throughout the land, and his name was everywhere spoken with gratitude and reverence.

Afterwards, parties rearranged themselves under the names of Federalists and Republicans.

In his *Life of Washington*, Marshall thus described these parties: "One of which," he wrote, "contemplated America as a Nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State governments, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

In Virginia the party which attached itself to the State governments was largely in the majority, and drew to it the influence and vigorous support of many of her ablest sons. The circumstances seemed to give support to their contentions. In order to put the new government in operation a great mass of important legislation by Congress was necessary; the several departments of the government, that of foreign affairs, of war, the treasury and the judiciary were to be organized; measures regulating foreign and interstate commerce, patents, crimes, and intercourse with the Indian tribes, demanded the most careful attention and the exercise of the highest powers. This great activity presented to the eyes of the people a com-

plex, vigorous and pervading system not before understood in its details, and calculated to excite alarm and opposition. Every measure which contemplated the development of the functions of the National Government, even when not in the amplitude of constitutional provisions, was assailed as part of a consistent and concerted scheme to overthrow the States, and erect upon their ruins a government in whose hands liberty was to be strangled. Party feeling ran so high that the debt which the country owed to Washington and the veneration which had been paid to his character were forgotten; and he and his administration were denounced with rancor and were accused of the most heinous crimes. Marshall threw himself into the strife. Never wavering in his loyalty to Washington, he defended with ardor the patriotism, the wisdom and the purity of the intentions of that remarkable man. . . .

Marshall was again drawn into a most interesting transaction. At the outbreak of the French Revolution the universal feelings were those of gratitude for assistance in the war, and of the warmest sympathy with the aspirations of an oppressed people for the inestimable blessings of liberty. The exquisite literature of France, the wit of Voltaire, the philosophy of Montesquieu, the comedies of Moliere, the classical tragedies of Racine, were familiar to cultivated people. French ideas, modes of life and language were the fashion of the time. But when the beautiful land became drunken with the blood of her noblest sons and daughters, and frenzied by the terrors of the revolution, some drew back from sight of so much horror and suppressed their sympathy for a people capable of such intoxication. When war between France and England was declared, the Directory demanded of our

government a return of the good offices by aid of which we had gained our independence, and active sympathy in its behalf against England, which it called a common enemy. Washington was deeply sensible of our debt, but was too self-poised to permit sentiment to overcome his judgment; and with calm and patriotic resolution he maintained that our true policy was strict neutrality, and the safe part was to give into the hands of neither of the parties any influence in our domestic affairs. This touched our early friend to the quick. The Directory was betrayed into an act of great and inexplicable indiscretion. In November, 1796, by order of the Directory, its Minister announced to the Secretary of State the suspension of his functions, in a letter which concluded with an inflammatory appeal to the American people against their government; reminding them of its treaty of amity with the tyrant of the seas, and declaring that an administration capable of such treachery was no longer deserving of the loyalty of a people whose independence had been cemented by the blood of Frenchmen. The Directory itself, in the same undiplomatic spirit, dismissed General Pinckney, our Minister to France, and in its address of dismissal to Mr. Monroe repeated the same offensive statements and the same appeal to the prejudices of the American people. This gross indignity deeply stirred the popular emotion and sense of respect of our countrymen and turned the tide of popular feeling against our early friends. In May, 1798, another mission composed of General Pinckney, Mr. Marshall and Mr. Gerry was dispatched to Paris. In his message, nominating these gentlemen, to the Senate, President Adams stated that in the critical and singular circumstances then existing it was of great importance to engage the confidence of the great portions

of the Union in the character of the persons employed and the measures to be adopted; and he had therefore adopted the expedient to nominate persons of talent and integrity long known and interested in the three great divisions of the country. And in his message to the House of Representatives he said:

“Such attempts to separate the people from their government, to persuade them that they had different affections, principles and interests from those of their fellow citizens, whom they had themselves chosen to manage their common concerns, and thus to produce divisions fatal to our peace, ought to be repelled with a decision which should convince France and the world that we were not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of honor, character and interest.”

When the ambassadors presented themselves at the Ministry of Foreign Affairs in Paris, the Secretary rudely refused to receive them; and they found themselves in the midst of the revolution, unprotected, exposed to violence and subject to contumely and insult. Talleyrand demanded what he was pleased to call a “gratification” of \$250,000 for himself and a loan to the Directory of 32,000,000 Dutch florins as the price of the privilege of entering upon the negotiations. For months he kept the ambassadors in suspense, while he and his agents again and again repeated these demands. The answer of the Americans to every one was, “No; no; not a sixpence.” Two letters were addressed to the rapacious Secretary, evidently from the pen of Marshall, in which the course of this country was powerfully defended and that of the Directory arraigned. The Commissioners at last aban-

doned their mission, received their passports, and Pinckney and Marshall returned home. In their dispatches to the government they set forth the obloquy to which our country had in their persons been subjected; and did so in a manner so clear, so moderate, and at the same time so impressive, that when the President, in a powerful message, communicated them to Congress, the halls of the two Houses and the whole country rang with one cry at the indignities which every citizen felt in his own person. Marshall landed in New York on the 17th of June, 1798, and reached Philadelphia, the seat of government, two days afterwards. His entrance into the city was a triumphal procession. He was escorted by the military and great crowds of his countrymen. Many of the most eminent citizens paid him their respects, and public addresses were presented to him, animated by sentiments of the highest respect and affection. A public dinner was given to him by members of both Houses of Congress as an evidence of affection for his person, and of their grateful approbation of the patriotic firmness with which he had sustained the dignity of his country during his important mission; and the country at large responded with one voice to the sentiment pronounced at this celebration, "Millions for defense, but not a cent for tribute."

At the earnest solicitation of Washington, he reluctantly consented to offer himself for Congress, and, after a sharply contested campaign, he was elected by a narrow majority. The House of Representatives was at the time filled by the most accomplished debaters, who displayed their powers upon every occasion. In those involving constitutional and legal questions, Marshall was universally recognized as the first man of the House. On one most interesting occasion (the case of Thomas Nash) he displayed the very highest powers.



After a year's service in the House, President Adams appointed him Secretary of State. He held that office only a few months, but in that time he had occasion to instruct our ministers to England upon the article of the treaty which related to compensation to British creditors, and upon questions of contraband, blockade and impressment. The conditions were critical. Negotiations with France were pending, at which England took offense and assumed a hostile attitude towards us on that account. Thus, in some respects, the language which he held to France in 1796 became necessary towards England. It was adopted without hesitation. "The United States," he said, "do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with the one or the other of those powers, but they are ready to make amicable and reasonable explanations to either. The aggressions sometimes of one and sometimes of another belligerent power have forced us to contemplate and prepare for war as a probable event. We have repelled, and we will continue to repel, injuries not doubtful in their nature and hostilities not to be misunderstood. But this is a situation of necessity, not of choice. It is one in which we are placed not by our own acts, but by the acts of others, and which we will change as soon as the conduct of others will permit us to change it."

Those papers are among the ablest of our diplomatic correspondence, and advanced the fame and influence of their author, not only in this country but abroad. It has been said of them that "it is impossible to imagine a finer spirit, more fearless, more dignified, more conciliatory, and more true to his country, than animates his instructions to Mr. King."

In November, 1799, Oliver Ellsworth, having been ap-

pointed one of the three ministers to France, resigned the office of Chief Justice. Jay was a second time nominated and confirmed, but declined the office. On the 31st of January, 1801, John Marshall was appointed and confirmed as Chief Justice, and at the term of February in that year took his seat.

The scene was the Court Room, now taken possession of for the first time. The apartment was semi-circular and spacious; the ceiling was formed by groined arches, and columns near the circumference followed its line. The heavy arches and massive pillars depressed the ceiling and gave a somber appearance, although crimson hangings behind the bench and a shield above it emblazoned with the arms of the United States lent some color to the room. On entering one could not have repressed a certain sense of solemnity and a consciousness that it was the place of great transactions. The Bar was well filled. Senators had come down from their chamber and Representatives had come from their hall—many of them personages of distinguished presence and of fame for eloquence, erudition, character and patriotism. Counsel had come from Richmond, Baltimore, Philadelphia, New York, Boston, and other cities, as learned and eloquent as the barristers who thronged Westminster; Ingersoll and Dallas and Edmund Randolph and Charles Lee and Tilghman and Hamilton and Dexter and others whose names we do not know.

The announcement was made, "The Chief Justice and the Associate Justices of the Supreme Court of the United States," and in presence of the members of the Bar standing in respectful attention, the Judges in procession ascended to their places and graciously saluted the great attendance. We cannot help thinking that those who,

in whatever office and capacity, had part in the event, appreciated its significance and had a glimpse of what should there be done,—the contentions of giants for the destinies of the Republic, the stately judgments, tender of the rights of the meanest citizen and setting forth the rules of truth and righteousness for the advancement of the race—I say we cannot help thinking that such witnesses of the scene could not repress a thrill of intensely exhilarating emotion.

Mark the persons of the Judges. The youngest was Alfred Moore, small in stature, neat in dress and graceful in manner, with a clear and sonorous voice, a keen sense of humor, a brilliant wit and overpowering logic, and a style as an advocate lucid and direct, terse and compact.

Bushrod Washington, the nephew of the Father of his Country, was a man of solid rather than brilliant mind, sagacious and searching rather than quick and eager, of temperate yet firm disposition, simple and reserved in manner, clear in statement, learned in discussion, accurate in reasoning, and animated by a love of justice as a ruling passion.

Samuel Chase had labored zealously and successfully to change the sentiments of Maryland so as to authorize him to vote for the Declaration of Independence of which he was one of the signers. He was of imposing stature and wielded the power of an energetic eloquence; but he was irascible, vain, overbearing, and sometimes tyrannical, with an instinct for tumult and a faculty for promoting insurrection at the Bar.

William Paterson was a member of the Convention which framed the Constitution. He contended that its proper object was a mere revision and extension of the Articles of Confederation, and proposed in that body

what was known as the New Jersey plan, which preserved the sovereignties of the States in their integrity and gave the General Government power to provide for the common defense and general welfare.

Next the Chief Justice, on his right, was William Cushing, appointed by Washington. A son of one of the judges who presided at the trial of the British soldiers for the massacre of citizens in the streets of Boston on the 5th of March, 1770, he succeeded his father as judge of the Supreme Court of Massachusetts. He was a graceful and dignified man, of fair complexion, blue eyes and enormous nose. A gentleman of the old school, he adhered to the style of the Revolution — wearing a three-cornered hat, wig and small clothes, with buckles in his shoes.

And in the midst of his brethren, before that splendid Bar, stood the Chief Justice. Only forty-five years old, he bore a stamp and mien impressive in a singular way. He was tall and slender, his complexion was dark, his eyes twinkled with humor and darkened to blackness when the nature behind them was aroused; the forehead, rather low, was terminated by a horizontal line of thick raven hair, his temples fully developed, his cheeks rather thin, the mouth wide, full and soft rather than hard, and the chin and jaw large and strong, showing a capacity for standing by his convictions. But it was not the separate features of the man that conveyed the impression of his character. They say there is a graciousness of kings, but there is another. He has it who has suffered much for his country and has looked into the deep things of liberty. His graciousness is not of princes, but of leaders of the people. It is not courtly manners nor the seductions of persuasive speech which dwell in royal

blood, but the unconscious dignity of exalted character. Such was Marshall. In the august presence of Senators and Representatives, counsel and venerable judges, his whole person was the embodiment of the Chief Justice.

His commission was read, and the oath of office administered. The Court and Bar were seated. A few simple words were spoken, a few formal matters were transacted, and the Court adjourned for the term.

It was a simple and dignified ceremony.

At the risk of repetition, I must beg your indulgence while I mention some of the aptitudes and qualifications of this illustrious man for the office he assumed this day, one hundred years ago. We have already seen that he had by nature a calm and equable temper; was free from self-consciousness, sought not his own and did not dispute the claims of others, and was brave and resolute upon due occasion. His fine and genuine nature disposed him to be judicial in his opinions and their expression. Little as men may think of it, impartiality is to a degree matter of temperament. And so it was that in his great office he was by nature no respecter of persons. He knew nothing about the parties, but everything about the case. He did everything for justice, but nothing for himself. He valued men not for what they had, neither riches nor station nor influence, but by what they were. So that it was natural for him to see neither great nor small, but attend only to "the trepidations of the balance."

This quality was conspicuously displayed at the trial of Aaron Burr. You know the romantic story of Burr's life; how brilliant he was, in the army, at the bar, and in the parlors of the women he charmed and captivated; how he reached the office of Vice-President and nearly won the Presidency from Jefferson. In an evil hour he



forced a duel upon Alexander Hamilton and killed him. A horror at the cruel tragedy ran through the whole country. All the honors which had been heaped upon the man, so popular, admired, courted but the day before, dropped from him, and he stood alone; his friends fled from him, all but his beautiful daughter, her husband and a few others. His clients sought other counsel, and the doors of the high places were closed to him. His restless and ambitious spirit would not down and sought adventure in another field. He organized an expedition to overrun some of the provinces of Mexico and establish a government of which he should be the head. It was a wild scheme, but it grew in his imagination until it embraced a part of the territory of the United States. It had not advanced so far as to be formidable when it collapsed. Jefferson set a price on the head of the adventurer, and he was pursued, arrested and brought to Richmond, where he was put upon trial for high treason before the Chief Justice.

Now mark the position of this great judge. The country was wild with excitement; the cry for vengeance rang loud through the land. Even the President became enlisted in the prosecution, and strained all his powers to secure conviction. Thus, on one side, was the overwhelming influence of popular execration and executive power, and, on the other, a solitary and forsaken man. And there was more than that with Marshall. He and Burr had known each other in the Army, at the Bar, and in Congress; but Marshall had always felt a deep distrust of Burr and a premonition of evil. That evil had come in the pitiful death of Hamilton, who, since the days at Valley Forge, had been the dearest friend of the judge. Every affection of the heart, every impulse of patriotism,

every desire to rid the country of this wicked man was arrayed against him. On his side was only the law.

The trial began on the 3d of August, 1807. Venire after venire was exhausted and only four jurors were found sufficiently unprejudiced to admit of their acceptance. At length the prisoner was allowed to select the other eight from the last venire; some even of these confessed that they had decided prejudices against the accused and had warmly denounced him on several occasions. They were, however, accepted and were sworn on the 17th of the month.

The testimony was continued to the 20th. The prosecution, without having proved an overt act, offered collateral evidence of evil design and purpose on the part of Burr. To this, objection was made. The debate upon this question continued nine days. It was at this point that Wirt delivered the remarkable declamation which is to this day found in the reading books of the schools. On Saturday evening Randolph concluded the discussion in an impressive speech. On Monday morning the Chief Justice delivered his opinion, which was to decide the case as well as the motion to exclude the testimony. The law of England upon the subject of high treason was examined and stated; it was said that, at the common law, to intend the subversion of the Crown was treason. Under that rule it was for the jury to say what were the designs and purposes of the prisoner; what they were, there was no room for doubt. But the court proceeded to say that here another rule had been declared in the Constitution; and that under it, it was not enough that the accused was guilty of the heinous crime of planning and plotting and contriving the overthrow of the Government, but that he must be shown to have levied war

against the United States or have adhered to their enemies. That was an exposition of the law of treason, novel and extraordinary. It drew a line of separation between the English and American conception of treason as broad as the Atlantic. It stayed the hand of the executioner from the numerous acts of blood which stain the pages of English history, and shows how vastly more humane, moderate and enlightened than any other is the American law of treason. Passing from this exposition of the law of treason, a masterly examination was made of the evidence, and it was found that the expedition and the preparation for it were not of such consequence as to constitute war within the meaning of the Constitution. The reading of the opinion consumed three hours.

The prisoner was discharged.

It has been said that "Upon that trial the scales of justice were held with absolutely even hand. No greater display of judicial skill and judicial rectitude was ever witnessed. No more effective dignity ever added weight to judicial language." How great was the disappointment is shown by the expressions which were indulged in by the counsel for the government, who exclaimed: "Marshall has stepped in between Burr and death," and the declaration of the President that the people of America demanded a conviction; and his message to Congress in which he expressed grave dissatisfaction with the conduct of the trial and its results. Marshall was content to abide the judgment of other times. It was given him to see with his own eyes his judgment approved as beneficent, wise and just.

Marshall had one experience which fitted him to be the great expounder of the Constitution; or rather, he had a series of experiences which extended to the time when

he took his seat upon the Bench. In the awful winter at Valley Forge he saw and experienced the inefficiency of the Confederation to conduct the war. On the one side, the pitiful spectacle of the soldiers in the bitter cold, unclothed, unfed, suffering from disease and meeting death, and in it all and through it all, brave, resolute, and never turning their faces from their country as they had never turned their backs to the foe; and on the other, Congress rent with local jealousies, and the States listless in enlistments and contributions which had been levied upon them, which their abilities could have easily supplied. And, besides, in the little family circle at headquarters, he listened to high discourse of the Chief, never more superb than at that time and in that place, and of the young Hamilton, brilliant, philosophical, far-seeing, and of other officers whose eyes, even in these sorry times, were filled with visions of a victorious, powerful, proud and united Nation. Not only the lamentable failure of the Confederation to show itself equal to the government of the young country; but what should take its place, what should be the form and the powers of a competent system, what the States must surrender of the fiction of sovereignty, and how adjust their relations to one another and the central authority, were there the subjects of debate. Afterwards a convention was called to form a Constitution; but I have often wondered if the real convention was not in that desolate camp and the real problems were not foreshadowed there. Later, when the war was over, the young Captain was settled in Richmond, and the convention was deliberating on the grave problems, he followed its discussions with an intelligence informed and stimulated by the lessons he had learned. At last the instrument came to Virginia for its considera-

tion and action; and Marshall took his seat as a member of the convention called for the purpose. In all the discussions upon the place and powers and functions of the different departments of the government he took his part with moderation and judgment and wisdom. And it so happened that he knew the Constitution from his youth upwards, not only in the consistency of its provisions and the symmetry of its whole scheme, but in its great and ultimate purpose to found a Nation of pervading authority and in its sphere supreme.

Nor did questions of domestic economy, grave and extensive as they were, limit the range of his vision. He was called to deal with the gravest problems of international law. He found his country assailed first by the arrogance of France and then by that of England. The claims of each were to be tested by the rules which an enlightened morality had prescribed for the intercourse of members of the great family of nations, in all the various relations of war and peace, including questions of neutrality, of prize, embargo and non-intercourse. With such exceptional preparation he came upon the Bench. He was learned in such learning as may suffice for a judge in the courts of law in any other country; but, as his office required, he was more than a lawyer; he was a statesman, dwelling and holding a place above the impurities of the lower atmosphere of party and disengaged from associations with common affairs.

The American jurisprudence, in its scope and compass, transcends that of any other country or time. The continental systems of laws are not to be brought into the comparison. They contain the principles of the purest and highest morality. But their practical administration displays an utter lack of the judicial instinct. The trial



of Dreyfus illustrates the incompetency of a French court under the French procedure to a fair, impartial and calm administration of justice. And so it is with all countries whose jurisprudence is founded on the civil law. The common law with its ameliorations of the past century, in its amplitude, beneficence, vigor and efficiency, is equal to all purposes of remedial justice between man and man and between the State and the citizen. This is as true in Great Britain as in our own country. But the nature and sphere and the theory of the government of that great and enlightened Nation withdraw a vast domain from the jurisdiction of the courts of law. There, Parliament is omnipotent. It may work its will upon the life, liberty and property of the citizen, annul his contracts, withdraw his franchises, and cast him out bereft of all that makes life desirable and beautiful. An act, innocent when committed, may afterwards be denounced as a crime. Rules sanctified by time and approved by the highest wisdom may, in a day, be legislated out of existence to the undoing of whole classes. I do not say that there are not moral restraints upon such ruthless proceedings, but the last century saw, on more occasions than one, acts of legislation which can be justified only upon the theory of the omnipotence of Parliament. Before such an august, imperious, transcendent power, judges and courts must bow in abject submission; the voices of the judges are silent and the doors are closed when the Parliament speaks. But in this country another rule holds sway. Here Congress and the President, the State Legislatures and the Governors are subjects as well as rulers; they have over them the will of the sovereign people, expressed in the provisions of the Constitution; and if any one of them oversteps its limits

or disobeys its mandates, the courts will open wide their doors for a refuge of the oppressed. Theirs is the last word upon every claim of right under the laws, treaties and Constitution of the United States.

If you would see the grandest and last exercise of this extraordinary jurisdiction, look upon the Supreme Court entertaining the large group of cases involving the questions to which our new possessions have given rise and insistence. The National Sovereignty, the President with all the authority inherent in the Executive, and Congress with all its legislative functions stand to-day at the Bar of the Supreme Court awaiting its judgment. It was to the awful dignity of Chief Justice of that extraordinary jurisdiction that he whom we commemorate in these exercises came this day one hundred years ago. He brought to his duties, faculties, capacities, disposition and a competency derived in a singular degree from natural temperament, from the discipline of a long and severe experience, from intimate association with Washington and the Fathers of the Republic, from profound meditation day and night through long years upon the system of government which their wisdom devised, and from high public office and the great duties which attended upon it.

Something must be said of Marshall's style and manner of speaking and writing; they were individual and singular at that day. In England and in this country at that time, oratory and great writing were elaborate, rotund and impassioned; there was the copious vocabulary, the sweep of sentences, imagery, analogy, and illustration drawn from every hand; warm, brilliant and striking allusions to picturesque passages in history, and quotations from classical authors. So too the elocution

was impassioned, energetic, graceful and captivating. The luxuriant discourses and declamation of Burke and Pinkney formed a golden age of oratory in both countries. But Marshall held another note. His words were plain and familiar, his sentences mostly short, and often cast in the form of interrogation, and his periods unadorned by ornament. He illustrated his thought very little by analogy, and never indulged in hyperbole or exaggeration; and his whole discourse was level to the common understanding. But he was never commonplace. The preparation of an argument or state paper was attended by exhaustive research, and the results which his industry had gathered were arranged, disposed and presented with consummate skill and effect. These copious resources were animated by the most cogent logic. I do not mean that his processes were artificial or guided by rules; anything specious or artful was as foreign to his moral as to his mental constitution. Perfect candor, the admission of the whole strength of the argument of his opponents, the giving to them full credit for sincerity, the support of his positions by considerations which his conscience approved, elevated his discourse to the highest moral altitude of which the subject was capable. His manner of delivery was as plain as his words, as simple as his thoughts, as dignified as his character, without much action, but earnest, emphatic and impressive. His progress from the accepted premises at the beginning, through the unfolding of the argument, went on in natural order without one point pertinent to the discussion omitted or slighted, or one just consideration inadequately presented, until it reached an irresistible conclusion.

It was within the plan of this address to state with

some particularity the circumstances of some of the important cases in which Marshall delivered the judgments of the court; but I am admonished that I have already exceeded the limits of your patience. I must content myself with saying that during the thirty-four years of his service, eleven hundred and six opinions were delivered, of which he wrote five hundred and nineteen. Of these, sixty-one were upon questions of constitutional law and he spoke for the court in thirty-six of them. It was enough to say of them that the principles he established are to-day institutes of the law, never in any way or degree impugned or qualified, and under their protection the people of this country repose in peace unto this day.

His days at last drew to their close. The labor and sorrow of more than three-score years and ten were upon him. He was left without the companionship of the wife he had married in his youth. Great pain came to him. He went to Philadelphia for medical skill that was unavailing. On the 6th of July, 1835, away from his home, but in the midst of his friends, in the language of the liturgy of his church, "he was gathered to his fathers, having the testimony of a good conscience, in the communion of the Catholic Church, in the confidence of a certain faith, in the comfort of a reasonable, religious and holy hope, in favor with God and in perfect charity with the world."

## STATE OF COLORADO.

Marshall Day was observed in Colorado under the direction of the State Bar Association in the Chamber of the House of Representatives, in the Capitol, at Denver, Vice-President K. R. Babbitt presiding, in the absence of the President, Moses Hallett. Two addresses were delivered — one by Charles N. Potter, Chief Justice of the Supreme Court of Wyoming, on “The Private Life and Character of John Marshall,” and the other by Julius C. Gunter, of Trinidad, Colorado, on “The Judicial and Other Public Services of John Marshall.” The addresses and proceedings may be found at large in the volume containing the official report of the Colorado State Bar Association for 1901. The editor regrets that space pressure compels the omission from the address of Chief Justice Potter of biographical incidents which have appeared in preceding addresses, and from Mr. Gunter’s address that portion which relates to the military, legislative and diplomatic services of Marshall.

### **Address of Charles N. Potter.**

The celebration of “John Marshall Day,” as originally conceived, had for its elemental purpose, as I understand it, the commemoration of the fortunate and epochal event which furnished to this country the distinguished expounder of the Constitution; to the end that the pre-eminent influence of John Marshall upon our institutions should be emphasized, and the people of our land brought



into a clearer recognition of his character and the fruitful significance of his public service; and as expressed in the original proposition which was submitted to the Illinois State Bar Association, that "the name of John Marshall" shall be made "a household word in the land."

The multitude readily grasp the meaning of great victories on the field of battle, and the successful commander is raised to the dignity of a popular hero in a day. Eminence of ability and strength of character exhibited by a Chief Executive meet a responsive acclaim in the hearts and expressions of the people. Quite naturally the silent influence of a great jurist in the interpretation of constitutional prerogatives and limitations is less easily comprehended.

With the Bench and Bar this day has connected with it also a personal feature. The occasion presents an opportunity for a new generation of lawyers to pay a just and deserved tribute to the consummate abilities, lofty character and illustrious services of a great judge, whose name is the pride of the American Bar, and whose profound judgments have shed an inextinguishable lustre upon American courts. The time seems ripe, also, at the beginning of a new century, as days and years are measured by the calendar, and when fresh and perplexing questions as to the scope of the fundamental instrument of our government, and the very nature of our national character and institutions are forcing themselves upon public attention, that the Bench and Bar of our country should be brought not only into a maturer acquaintance with the opinions entertained and pronounced by our greatest Chief Justice, but as well into a closer intimacy with the man himself.

I take the liberty of assuming that with some such

view as this your committee have selected as the subject for my address, "The Private Life and Character of John Marshall."

We shall not recall the events, more or less familiar, of the life of Marshall in a spirit of mere idle curiosity, but reverently rather in recognition of the truth of the expression that the characters of great men are the dowry of a nation. Emerson has said that "the truest test of civilization" is not the census, nor the size of cities, nor the crops, but the kind of men the country turns out. And another writer, in defining character, says: "There is something in a man's life greater than his occupation or achievements; grander than acquisition or wealth; higher than genius; more enduring than fame."

Marshall was great not only in intellectual attainments and public achievement, but he was great also as a man. His was the highest type of American manhood. In many respects which distinguish one man from another, as they are observed in their daily walk, John Marshall towered far above the ordinary run of men.

History draws its life from the men who made it; not only as they appear in public, but quite as much as they are in private life, and as they are known by those with whom they are brought into daily contact. It is a source of profound gratification that in reviewing the private life and character of John Marshall nothing is to be found which we shall have occasion to regret, and nothing to apologize for or excuse. As a ball or other object when thrown by an athlete will acquire greater force and momentum and pierce the atmosphere to a greater distance before surrendering to the power of gravitation than when cast forth by a weaker arm, so the conclusions and judicial opinions of Marshall were intensified by the

purity and strength of character of the man himself. A distinguished admiral of our navy, after the conclusion of the late Spanish-American conflict, ascribed in large part the success of our navy to the character of the men behind American guns. It seems to me almost a truism that the determination of the majestic forensic battles, which occurred at the bar of the highest court of the land in the early days of our national life, depended largely upon the character of Marshall and his distinguished associates who were by force of circumstance the final arbiters of the momentous questions involved. Assuming at any rate that this view possesses a reasonable degree of accuracy, the student of the history of our government should be deeply interested in all that concerns John Marshall, whether in public or private life.

Although the imperishable renown of Marshall rests largely upon the distinction attained by him in public office, it is nevertheless an interesting fact that he came from a distinguished ancestry. He belonged to that race of cavaliers whose influence upon the American character and our national history has been distinctively marked.

After referring to Marshall's lineage, education, including his attendance at William and Mary College, military services, personal appearance, marriage, and other domestic incidents, the orator proceeded:

Marshall loved the law. He had frequently served as judge-advocate during his military career in such manner as to command the admiration and respect of officers and men. He began his practice in Fauquier county, but not long afterwards removed to Richmond. He rose rapidly at the bar, and soon became a leader among the comparatively large number of eminent and successful lawyers

then practising in Virginia. It is recorded of him that he was not compelled to undergo the trials of the probationary period usually falling to the lot of the young lawyer. Almost at once he acquired a large and influential clientage. The end of the conflict with Great Britain brought on an immense amount of litigation, partly as a result of the strife and partly because of the delays which that strife had rendered necessary in the adjustment of controversies. But with all the fortunate circumstances, as a lawyer might selfishly view them, which tended to bring practice to the young lawyer of that period, the ability of John Marshall, his logical mind and popular personality were sufficient to place him in the front rank of the profession. In modern times we are apt to wonder at the success of one who had so little education along general lines acquired from schools, as well as to be surprised at the limited time occupied by so great a man as Marshall in the study of law before he became an active practitioner. The period of his legal study is apt to appear to us as quite inadequate to the acquirement of the knowledge now regarded as essential to reasonable success at the bar. We know, however, that notwithstanding his lack of schooling he was in later life distinguished for his vast amount of learning in all branches. In the law the native powers of his mind were such that he had easily grasped the fundamental principles of our jurisprudence and became a truly profound lawyer and successful practitioner without apparently taking time beforehand for thorough preparation. True, this is to be partially explained by the fact that the law was not then so complex as now. But it also illustrates the vigorous faculties of Marshall and his possession of those peculiar attributes of mind which make a man

great in the law. His mastery of a legal principle seemed to be almost intuitive; but his conclusions were ever the result of close analysis and cogent reasoning. In 1808, Judge Story writing of him said: "His genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering inspection, and unravels the mysteries with irresistible acuteness."

The oratory of John Marshall was characterized by lucidity of statement, logic and force, rather than by elegance of diction. His language was chaste; but his style was argumentative. He sought not to bring a smile to the lips nor a tear to the eye. He did not speak to the heart or the affections. Neither did he attempt by the mere beauty of expression to captivate the ear, inflame the passions or inspire the imagination. His appeal went exclusively to the judgment. It must not be supposed that he was, however, an uninteresting speaker. He never failed to attract close and continued attention, and his words fell upon the ears of his audience often with irresistible force. He usually began an address with reluctance, some hesitation and vacancy of eye, but as he warmed to his subject he became more bold of manner, the hesitation departed, his utterance grew clear and rapid, and his whole countenance glistened with genius and passion; and with great earnestness and enthusiasm he poured forth "The unbroken stream of eloquence in a current, deep, majestic, smooth and strong."

His professional career was frequently interrupted by the political exigencies of the times, which required him to represent the people in a public capacity. Office he never sought. Several of the stations filled by him were



accepted at much inconvenience, and only by reason of the urgent demands of an insistent constituency. His candidacy for Congress was strongly opposed to his inclinations and the result of the earnest solicitation of Washington.

He served one term in Congress, represented his government as an envoy extraordinary and minister plenipotentiary to France, and while Secretary of State in the Cabinet of President Adams was on January 31, 1801, in his forty-sixth year, appointed to the office of Chief Justice, taking his seat on the fourth day of February.

As we are to pass the almost sacred precincts of his private life and catch glimpses of the man in the more intimate relationships of family and friends, let me introduce him to you as they knew him. His figure was tall and slender, erect and steady, but not imposing nor altogether graceful. When he ascended to the dignity of Chief Justice his hair was black; but later it took on the ripening gray of age. He wore his hair tied in a cue according to the custom of the times. He was usually referred to as "a plain man." His eyes were black and twinkling and always attracted one upon first meeting with him. Parton, in his life of Aaron Burr, speaks of them as the "finest ever seen," except Burr's; "large, black, and brilliant beyond description."

Harriet Martineau described him as she saw him near the close of his life in these words: "How delighted we were to see Judge Story bring in the tall, majestic, bright-eyed old man; old by chronology, by the lines on his composed face, and by his services to the Republic; but so dignified, so fresh, so present to the time, that no feeling of compassionate consideration for age dared to mix

with the contemplation of him." And another has said of him that his countenance indicated "that simplicity of mind and benignity which so eminently distinguished his character."

It was no unusual occurrence for that distinguished man to walk the streets from the market to his home with supplies for his table. It was then the custom, indeed, for gentlemen to attend personally to their own marketing; and it is said that "the Old Market on lower Main street in Richmond witnessed many friendly meetings each morning of solid men and echoed to much wise and witty talk. Behind each gentleman stood and walked a negro footman, bearing a big basket in which the morning purchases were deposited and taken home."

He certainly paid some attention to the demands of his office in the way of dress, because, as he informs his wife in 1825, he administered the oath of office to President John Quincy Adams, and was clad in a "new suit of domestic manufacture;" and he also informs his wife that the President was dressed in the same manner, though the cloth of the garments of the latter was, as he said, made at a different establishment. He adds, with some satisfaction, that "the cloth is very fine and smooth."

The official demands upon the duty of the Chief Justice being confined to the sessions of the Supreme Court at Washington, and looking after the Circuit in Virginia and North Carolina, he had the privilege during much of the year of remaining at home. He owned a farm near Richmond, and was extremely fond of agriculture and well informed upon all matters pertaining to the successful cultivation of the Virginia soil. A fair share of his leisure from official duties was devoted to the farm;

and he took especial delight in superintending its operation.

The house in which Marshall lived at Richmond was built by himself, and is still standing on the corner of Marshall and Ninth streets. It was a commodious structure, but modest in appearance and made no pretensions to architectural beauty. We are told that the exterior has never been remodeled, and but few changes have been made within. In this home the Chief Justice was a most delightful host. Courteous and hospitable and a prince of entertainers, his house was always an attractive place for his friends. He cherished the society of young people; and they were frequently guests in his home, his gentleness and generous conduct toward them inviting confidence and inspiring affectionate regard. Here, also, he and the wife he adored so profoundly reared a family of six children—five sons and one daughter. They lost several others in childhood, which occasioned them much sorrow. Marshall was a kind and devoted father and deeply concerned in all that pertained to the welfare and happiness of his children.

Chief Justice Marshall was a social man as well as a great jurist, and delighted in the companionship of congenial spirits. He had a jovial laugh, one which his friends liked immensely to hear—such a laugh as is never found in the possession of an intriguer. It was the very antithesis of insincerity. His whole spirit abounded with buoyant good nature, and the tranquillity of his temper, unflagging patience, generous disposition and never-failing courtesy rendered him equally agreeable in all the relations of his life; and particularly was he companionable in the retirement of his home and in the presence of intimate friends.

All his life the distinguished jurist keenly relished the game of quoits, then a popular out-door sport. He was one of the most popular and enthusiastic members, and skilful withal, of the Richmond Quoit Club, organized in 1778, and maintaining an active existence for more than forty years. The meetings of that club were held once every two weeks, during the spring and summer, about one mile from the city.

His friendships were numerous, ardent and sincere, and his conversation with friends continued to be marked by cheerfulness and lack of restraint. He had few real enemies. He had, of course, opposition, but it is only through opposition that great strength of character is fully developed. When party spirit was unusually aroused, or his convictions demanded conscientious and forcible expression, or some decision which his judgment impelled him to render was antagonistic to the theories or desires of political opponents, he encountered adverse criticism, some of which seemed at the time to be unkind; and surely it was unmerited. Censure of any kind was hurtful to his rather sensitive nature; but he preferred censure to a disregard of duty as he saw it. Between Washington and Marshall there existed a warm and deep attachment; and for Hamilton, Marshall had an ardent admiration and a strong feeling of friendship.

He was a man of strong moral convictions and unflinching courage in performing his duty as a man, public officer and judge in accordance with what he deemed to be right. Nevertheless, it is recorded that he had neither frays in boyhood nor quarrels in manhood, but was, on the contrary, "the composer of strifes."

The judicial fairness not only, but the fortitude of Marshall stood out more strikingly, perhaps, upon the

occasion of the trial of Burr for treason than in any other individual instance in his career. Notwithstanding his strong friendship for Hamilton, who had been slain by Burr, it will be continually heralded throughout all time that Marshall, as Chief Justice, presided over that trial in such an impartial manner as to attract peculiar notice; and pronounced his judgments with consummate fidelity to his convictions, in the face of a public clamor for the punishment of the accused seldom equaled in this country, and with a knowledge on the part of Marshall of the censure which the inflamed passions of the day would cause to be brought upon him and to be written and spoken about him, should the trial result, as it did, in Burr's acquittal.

It may be interesting, it has been interesting to me, and I will quote from a contemporary who was present at the trial of Burr and thus portrayed the scene when the grand jury handed down the indictments against Burr and Blennerhassett: "I never saw such a group of shocked faces. The Chief Justice, who is a very dark man, shrunk back with horror upon his seat and turned black; he kept his eyes fixed upon Burr with an expression of sympathy so agonizing, and horror so deep and overwhelming, that he seemed for two or three seconds to have forgotten where and who he was. I observed him, and saw him start from his reverie under the consciousness that he was giving way too much to his feelings and looked around upon the multitude to see if he had been noticed." And the writer adds: "He is, I believe, one of the greatest and best of men; some of our political friends, warped by their prejudices, think him too much warped by his; if he is so, he does not know it, for never did I know a man who was more solicitous to cast every



bias from his mind and decide every proposition on its abstract merits. I think he has sometimes decided wrong, but it is much more probable that I myself am wrong."

Although Marshall was indifferent to dress, and gave little attention to display or artificial adornment of his person, his charm of manner, purity of thought, and unconcealed admiration for the fair sex made him attractive to women, whose society he greatly enjoyed. Their many virtues inspired in him a degree of reverence which rendered impossible in his presence any flippant or uncomplimentary reference to womankind. In him the intelligence and claims of women found a ready and an able champion. He retained an estate in Fauquier county, where one or more of his sons resided; and it was his annual custom to visit them. On each of these occasions a dinner was given, attended by all his relatives in the neighborhood. Thus, he remained in agreeable intimacy with his children and grandchildren. At such times the simplicity of his manner disarmed any feeling of restraint which awe for his high office or admiration for his ability might otherwise have occasioned; and there was that freedom of association between himself and his grandchildren not differing from the case of any ordinary individual.

It was the privilege and joy of his friends to speak and write enthusiastically of the purity of his life. He was an honest man in all relations, and what is equally if not more creditable, he was honest with himself.

Although a slaveholder he was not an admirer of the system. He earnestly wished that it might be totally eradicated, but he did not favor immediate emancipation, which might involve the retention of the negro population in the locality where they had served their term of

bondage. He strenuously supported a scheme then attracting some attention for voluntary deportation which was proposed by what was known as the Colonization Society. In his will he made provision for one of his slaves, his body servant, whom he designates as "my faithful servant Robbin." He directed his emancipation if the latter should choose to "conform to the laws on that subject requiring that he should leave the State, or if permission can be obtained for his continuing to reside in it."

The Chief Justice was not a communicant of any church, but was a regular attendant upon the services of the Episcopal Church.

The peculiar sweetness of Marshall's character was exalted in a loving devotion throughout the entire forty-eight years of their married life to the companion who, on account of his well-known and unswerving loyalty, was spoken of by his acquaintances as unquestionably a model wife. With her he was at all times most tenderly considerate. For many years she had been an invalid, and there is not recorded in all history a more beautiful devotion of husband to wife than that felt and displayed by Marshall. He never ceased to be the lover of their earlier years. On the first anniversary of her death he wrote a tribute to her character, beautiful and touching. By that tribute Marshall not only perpetuated the character of a noble and charming woman, who had been estimable as a wife and mother, and deserved all commendation capable of expression, but it unconsciously betrayed the beauty and sublimity of his own nature. It was Christmas day, and he writes: "This day of joy and festivity to the whole Christian world is to my sad heart the anniversary of the keenest affliction which humanity

can sustain. While all around is gladness, my mind dwells on the silent tomb and cherishes the remembrance of the beloved object it contains." He referred to her who had gone as the companion that had sweetened the choicest part of his life, had rendered toil a pleasure, had partaken of all his feelings, and was enthroned in the inmost recesses of his heart. He recalls having often relied upon her judgment in situations of some perplexity; and states that he did not recollect to have once regretted the adoption of her opinion.

Marshall died July 6, 1835, at Philadelphia, where he had gone for medical treatment. Thus there passed from the stage of earthly activity a grand personality, one who had been unrivaled as a jurist and had been admired and beloved by his country; a man who possessed the rarest endowments of mind and heart, had cherished the loftiest sentiments that ennoble the moral and spiritual constitution of mankind, had retained a steadfast reliance upon the beneficence of Divine Providence while partaking of the bitter cup of bereavement, and finally entered upon that sleep which knows no waking this side the grave with fortitude and serenity of spirit.

Consistent with the notable simplicity that had dignified his life, the inscription for the stone marking his last resting place, written by himself as the hour of dissolution drew near, contains only a brief statement of his birth, parentage, marriage and death. Fifty years later an appreciative country caused to be erected a monument to his memory consisting of a bronze statue near the west front of the Capitol at Washington; and it was unveiled with appropriate services May 10, 1884.

May not the celebrations of this day throughout the Union be regarded as fitting ceremonies at the unveiling

of a monument more enduring and exceeding in grandeur any capable of being fashioned out of metal or stone. Are not the sentiments this day aroused in the minds and affections of the American people — reverence for a sublime character and gratitude for distinguished services — more lasting and precious than marble or bronze, however beautiful and expressive the latter may become by the aid of the sculptor's art? For this imaginary monument — no, not imaginary but unrepresented by anything which the eye can behold — may I be allowed, in closing, to suggest an inscription. For such, the following lines, written by Justice Story, as an inscription for a cenotaph seem peculiarly appropriate:

“To Marshall reared — the great, the good, the wise;  
Born for all ages, honored in all skies;  
His was the fame to mortals rarely given;  
Begun on earth, but fixed in aim on heaven.  
Genius and learning, and consummate skill,  
Moulding each thought, obedient to the will;  
Affections pure, as e'er warmed human breast,  
And love, in blessing others, doubly blest;  
Virtue unspotted, uncorrupted truth,  
Gentle in age, and beautiful in youth;  
These were his bright possessions. These had power  
To charm through life and cheer his dying hour.  
Are these all perished? No, but snatched from time,  
To bloom afresh in yonder sphere sublime.  
Kind was the doom (the fruit was ripe) to die,  
Mortal is clothed with immortality.”

#### **Address of Julius C. Gunter.**

After an appropriate introduction and review of Marshall's military, legislative, diplomatic and other public services prior to his appointment as Chief Justice, the orator proceeded:

That sturdy son of Massachusetts, John Adams, who had moved the adoption of the Declaration of Independ-

ence; who, uninfluenced by sectional prejudices, inspired by his love for country, moved the appointment of the Virginian, General Washington, as commander-in-chief of the armies of the colonies, closed his Presidential term within a few weeks after affixing his signature to the commission which made John Marshall, the Virginian, Chief Justice of the Supreme Court of the United States. On the fourth of March 4, 1801, Thomas Jefferson became President of the United States; John Marshall, Chief Justice.

At the earnest solicitation of Washington, Jefferson had returned from France to become his Secretary of State — Hamilton had entered the Cabinet as Secretary of the Treasury. The tendency to concentration began its struggle with the tendency to diffuse. All members of the Cabinet were friends and supporters of the Constitution — their views widely differed as to the scope of its powers. To the regret of General Washington, Jefferson, after several years of invaluable service in the Cabinet, resigned. Hamilton, against the remonstrance of the President, likewise withdrew — the struggle went on. The nation was divided into two great parties; the one fearing the destruction of the liberties of the people by centralization, the other the fall of the Republic by dissolution. These two great parties had just closed their most excited and violent campaign when Marshall, the leader of one, became the head of the judicial department, when Jefferson, founder of democracy, became the head of the executive department. Can we doubt that their divergent views have materially contributed to the existence of the conservative government that is ours — that the conflict of forces produced a better result than had they not met? The nation possesses, under the Constitution,



all powers necessary and convenient for the discharge of its functions, yet the States retain the powers of local self-government. Vigilance and antagonism have prevented radicalism.

Marshall's training for the bar before admission had been limited, but his practice great. He had practised at the Richmond bar. If time permitted, it would entertain to linger over the personnel of this bar — it must suffice to say, here practised some of the ablest lawyers who have graced the annals of the American bar. It was said of this bar in an important case by a visiting foreigner, "If any one of them had spoken in Westminster Hall he would have been honored with a peerage." In his practice here, and in the Federal trial courts and the Supreme Court of the United States, he had met many of the ablest constitutional lawyers of America. In the courts, in the legislature and other public assemblages he had gone widely and deeply into questions of general law, international law and constitutional law. His natural gifts for the judicial consideration of constitutional and international questions were unsurpassed. The solution of such questions was to be upon right reason and not upon precedent. A new written Constitution was to be interpreted. A Constitution regulating the powers of the Nation, the powers of the States under our dual and complex system. The work before Marshall was more difficult than that which confronted Lords Mansfield, Stowell or Nottingham; those great judges had the aid of writings of the Continental jurists in similar fields of labor. Marshall was to reach conclusions in matters without precedent at home or abroad. When Marshall ascended the bench, Jay and Ellsworth had presided — the Court had been in existence eleven years. All decisions of that Court and of the Circuit and District Courts of the United States

prior to that time are contained in less than seven hundred pages of Dallas' Reports. Reports of all decisions of all Colonial and State courts published prior to 1801 are contained in less than a dozen volumes of ordinary size. Only six cases involving constitutional questions had then been ruled by the Supreme Court of the United States. Two of these became valueless by the eleventh amendment to the Constitution.

But little had been done by the courts in adapting the common law to our institutions. Questions arising out of the war in Europe; questions arising from the extension of the authority of the United States by treaty over territory not originally within its jurisdiction, were comparatively new and required judicial settlement. This marvelous man, who seventeen years after being called to the bar is now the Nation's Chief Justice and confronted with profound and difficult questions, is equal to the task. Great as he was he was greater for those about him. With him sat Paterson, Bushrod Washington, Story for twenty-four years, and other jurists of eminence. At the altar of the high tribunal over which he presided ministered Webster, Pinkney with his profound learning and classical oratory, Emmet with his saddened life and touching eloquence, Wirt, Dexter, Luther Martin and others of the most illustrious of the American bar. Arguments were patiently heard, yea demanded, by Marshall, and no one profited by them more. Cases deliberately considered, his opinions not filed until prepared with the greatest of care, models of reasoning and judicial style. Commencing with *Marbury v. Madison*, came in quick succession many cases of constitutional, national and general law. Marshall, like Lords Holt and Mansfield, was called upon to frame a system of jurisprudence. Pinkney has said: "He was born to be Chief Justice of

any country in which he lived." During the thirty-five years he sat, as admitted by his learned associates, his was the master mind, the controlling influence in their deliberations. The first volume of Cranch's Reports embraces the work of two full years — all the opinions, save one, from the pen of Marshall. *Ogden v. Saunders* is the only case involving a constitutional question upon which the majority of the court ever differed from the Chief Justice. Eminent lawyers have considered that in his dissent Marshall had the weight of the argument.

A word to his duties on the circuit:

Presiding over trials by jury, patient, courteous, considerate of the bar, dignified without effort, quick to grasp the issues, prompt in ruling, serenely impartial, showing the most absolute courage and independence. May we cite the dramatic trial of Aaron Burr, the charge high treason — the penalty death — the defendant Aaron Burr. This defendant, a gallant veteran of the Revolution, as Vice-President, had presided over the Senate of the United States "with the dignity and impartiality of an angel;" within one vote of defeating Thomas Jefferson as President of the United States; with qualities to win the reason of men and charm the hearts of women; defended by Edmund Randolph, Luther Martin and other able counsel, yet one of the ablest of his counsel. President Jefferson believed him guilty and wished his conviction; the American people excited and demanding a conviction; the most distinguished counsel among them, the brilliant and gifted William Wirt, urging the cause of the government.

Although the mob without could procure the conviction and sentence to ignominious death of the guiltless and the gentle Nazarene before the Roman Pilate! Although the convincing eloquence of Burke, Fox and Sheridan

and the influence of Pitt could not as against the public wish procure of England's House of Peers the conviction of the accused plunderer of India, guilty, yet this defendant, Burr, whose hands were red with the blood of Hamilton, one of the dearest of the personal and political friends of Marshall's life, was acquitted before Marshall after a trial God-like in its impartiality. It would be inappropriate here to even enumerate the multitude of prize, commercial, insurance and land cases ruled by the Supreme Court in the time of Chief Justice Marshall. His opinions during nearly thirty-five years on the bench ran through some twenty-five volumes of reports. His great fame rests especially upon his constitutional decisions. Fifty-one decisions upon the law of the Federal Constitution were rendered in his time. In thirty-four of these the opinion was delivered by the Chief Justice — twice as many as those rendered by all the other judges. Here the great Chief Justice was at home, here his emphatically legal and statesmanlike mind was at its congenial work. He found the Constitution without construction, opinion as to its powers widely divided; at the end of his long and eminent career he left a harmonious system of constitutional law.

In the seventy-fifth year of his age he discharged his last public service other than that judicial. A convention sat for a revision of the Constitution of Virginia. Ex-Presidents Madison and Monroe, physically enfeebled with years and infirmities, at the solicitation of their fellow-citizens emerged from the congenial serenity of their retired lives to serve their countrymen again, as members of this convention. Upon the same call Chief Justice Marshall was also there. There not merely as honorary, venerated statesmen of the past, but there with their wisdom, their love of country, their conservatism,

to labor to make another offering on the altar of their beloved State. As these venerable patriots sit in solemn council, aiding with their wisdom and experience in constructing a Constitution for Virginia, tempting is it to linger with a scene so inspiring in its patriotism. It must suffice to say Marshall here contributed another valuable service from his useful life.

Enamored with this fascinating subject, too much time I have taken, perhaps extravagance used. If extravagant, Story, who sat with him, Rawle and Chief Justice Waite, who spoke to his life and character fifty years after his death, were also extravagant. This life so ennobling in its contemplation, so useful in its public service, with its simplicity of character, its tenderness for youth, its respect for age, and its chivalrous deference to women, its quiet, reasonable belief in the religion of the Christ, went out in the city of Philadelphia — “The star of the mortal sank into the sunrise of immortality.” The same old Liberty Bell which joyously rang out the declaration of our country’s freedom announced to his fellow-citizens that the judicial and earthly career of the great jurist was closed. The old bell was rent in tolling—it has hung in silence since.

**Address of U. M. Rose — Comments on the cases of Marbury and Cohens, and on the Trial of Burr.**

The volume of the report of the proceedings of the Colorado Bar Association for 1901, above mentioned, contains in full an address before the Association by Hon. U. M. Rose, of Little Rock, Arkansas, on a subject which he entitles “The Case between Jefferson and Marshall.” If space allowed, the editor would have included Judge



Rose's address, although not delivered on Marshall Day. The extracts below, relating mainly to the great cases of *Marbury v. Madison*, *Cohens v. Virginia*, and the Trial of Burr, are given because of the value which the profession attaches to the views of Judge Rose on questions of this character.

After tracing the conflicts and differences of opinion between the two great Virginians, Jefferson and Marshall, from the beginning down to the decision in *Marbury v. Madison*, and stating the circumstances out of which that case arose and the points which were discussed and determined in the opinion of the Chief Justice, Judge Rose said:

To Mr. Jefferson this opinion was exasperating in the last degree, and he often referred to it with extreme reprehension. On one occasion he wrote: "The practice of Judge Marshall in traveling out of his case to prescribe what the law would be in a moot case not before the court is very irregular, and very censurable." Then, referring to the case of *Marbury v. Madison*, he added: "The court determined at once that, being an original process, they had no cognizance of it, and therefore the question before them was ended; but the Chief Justice went on to lay down what the law would be had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other court having the jurisdiction what they should do if *Marbury* should apply to them. . . . Yet this case is continually cited by bench and bar as if it were settled law, without animadversion on its being an *obiter* dissertation of the Chief Justice."

If it is true that this part of the opinion in *Marbury v. Madison* is a mere *dictum*, then the case now under consideration must be decided against Marshall at once. If

he went outside of the record in order to place the President in a bad light, his conduct, inexcusable in any case, is only aggravated by the fact that the President was his personal enemy. A judge who will avail himself of his position on the bench to vent his ill-will on persons not before the court, simply because he is not on friendly terms with them, merits the severest censure. But I venture to think that the part of the opinion in the Marbury case which Mr. Jefferson regarded, no doubt sincerely, as *obiter*, was not such in point of fact; and that according to all judicial precedents the court was constrained to pass on the question as to the sufficiency of the facts presented to make out a case under the statute, though the statute was held to be unconstitutional.

In the absence of a demurrer the court was compelled to examine the facts as alleged and proved in order to see whether they brought the case within the meaning of the statute; for the courts cannot pronounce a statute unconstitutional where the facts, either as admitted or proved, fail to show that the question of its validity is directly and necessarily involved in the case presented. In the Marbury case if the petition and the evidence had not shown that, according to the terms of the statute, the petitioner was entitled to the relief sought, it would have been the duty of the court to deny the relief on that ground alone. Mr. Cooley says:

“In any case where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until

a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable.”<sup>1</sup>

With this statement of the law, which will hardly be questioned, it cannot with any propriety be asserted that the part of the opinion of Marshall which is based on the facts of the case is made up of mere *dicta*; by which is meant, as Bouvier tells us, “opinions expressed by the judges on points that do not necessarily arise.”

But this was not the only objection made by Jefferson to the opinion of Marshall. He also said: “. . . If there is a principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed. Although signed and sealed, yet as long as it remains in the hands of the party himself it is *in fieri* only; it is not a deed, and can be made so only by its delivery. In the hands of a third person it may be made an escrow. But whatever is in the hands of the executive officers is certainly deemed to be in the hands of the President.”

This reasoning is entirely fallacious. There is no real analogy between an appointment to an office and a deed. The law is well settled that a delivery of a commission is not necessary to complete the appointment.<sup>2</sup> Neither is delivery necessary to the validity of letters patent or of patents for lands.<sup>3</sup> An escrow is a conditional delivery of a deed to a stranger until certain conditions shall be performed, when it is to be delivered to the grantee. President Adams had not delivered the commission of Marbury to the Secretary of State upon any condition.

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<sup>1</sup> Const. Lim., p. \*163; *Liverpool Co. v. Commissioners*, 113 U. S. 33.

<sup>2</sup> *Mechem*, Public Offices, sec. 114.

<sup>3</sup> 19 Enc. Law, p. 350; *United States v. Schurz*, 102 U. S. 378.

Nor was it correct to say that any document in the hands of the Secretary of State is in the hands of the President. The office of Secretary of State is as distinct as that of Postmaster-General, and the duties of the Secretary are defined by law.

As Mr. Jefferson treated the ruling in *Marbury v. Madison* as not binding on account of want of jurisdiction in the court that rendered it, Mr. Marbury, though he attained to immortality by having his name connected with one of the most important decisions ever rendered by any court, never got his commission as justice of the peace. Jefferson thought that in passing on the right of the petitioner to the commission signed by President Adams the intention of Marshall was to instruct some other court, having jurisdiction, how to proceed in finally settling the controversy; but as at that time no one perceived that any other court possessed the jurisdiction that Congress had vainly attempted to confer on the Supreme Court, nothing further was done. There was a way in which the commission could have been obtained; but it was so obscure that it took thirty-five years to find it out.

The Supreme Court of the United States in *Kendall v. United States*, 12 Peters, 524, held that the Circuit Court of the District of Columbia had jurisdiction to issue writs of *mandamus* to the heads of departments by virtue of the Act of Congress of February 27, 1801, extending the laws of Maryland over that part of the District of Columbia ceded by that State to the United States. The court inferred that as the courts of Maryland had jurisdiction by common law to issue writs of *mandamus*, the same jurisdiction was transferred by the Act of Congress just mentioned to the Circuit Court of the District of

Columbia. The conclusion of the court was so far from being obvious that Chief Justice Taney and two other judges filed vigorous dissenting opinions; but the principle announced by the majority has since been frequently affirmed.<sup>1</sup>

After referring to the decision of *Chisholm v. Georgia*, Judge Rose continued:

The evils apprehended from this decision led to the adoption of the eleventh amendment to the Constitution, declaring that the Federal jurisdiction shall not extend to suits brought against any State by citizens of another State, or by citizens or subjects of any foreign State.

This amendment gave rise to the case of *Cohens v. Virginia*, 6 Wheaton, 264, decided in 1821. It was contended that as the State of Virginia was a party to the suit, a writ of error would not lie to the State court of last resort, although a Federal question was involved, because this was a suit against a State within the meaning of the eleventh amendment; but the court held that it had jurisdiction under the clause extending the judicial power to all cases "arising under the Constitution, the laws of the United States, and treaties made under their authority;" and that a writ of error is not a suit, but is merely the continuation of a suit already brought.

Mr. Jefferson often referred to this decision as being a usurpation, and as trenching on the reserved rights of the States; but no plausible answer has ever been made to the able opinion delivered by Marshall. Had the case been decided otherwise our system of laws would have become destitute of uniformity, and every State might have adopted distinct principles of construction of the Federal Constitution. Mr. Tucker, in his work on the

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<sup>1</sup> *United States v. Schurz*, 102 U. S. 393.



Constitution of the United States (vol. II, sec. 367), in speaking of this case says: "It is unnecessary to discuss the merits of this celebrated controversy; for the State courts throughout the Union, in Virginia as well as in the other States, have recognized the finality of the decision of the Supreme Court; and for nearly eighty years this has been established in all of the courts as a settled construction."

Jefferson often re-asserted that the Supreme Court had no power to disregard any act of Congress or of the executive as void because in violation of constitutional provisions. Writing to Jarvis September 28, 1820, he says: "You seem to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. . . . The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruption of time and party its members would become despots. It has more wisely made all the departments co-equal and co-sovereign with themselves."<sup>1</sup>

Jefferson was so suspicious of the Supreme Court that he wished to have the judges polled as juries are sometimes. He said: "An opinion of the court is huddled up in conclave, perhaps by a majority of one, delivered as unanimous, and with the silent acquiescence of lax or timid associates, by a crafty Chief Judge who sophisticates the law to his own mind by the turn of his own reasoning." He adds that the Attorney-General once introduced a bill in Congress requiring the judges to deliver *seriatim* opinions.

Again he said: "The very idea of cooking up opinions

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<sup>1</sup> Ford, Writings of Jefferson, Vol. X, p. 160.

in conclave begets suspicions that something passes which fears the public ear."

Jefferson often repeated the objections that the opinions of the Supreme Court were made up in secret, and that the judges did not deliver *seriatim* opinions, as was often done in England. It is difficult to see how the judges could consult in public, though there was a law enacted in France during the Reign of Terror requiring the judges to do so; the real object being to keep them always in the presence of the mob and under its control; indeed, to keep them from consulting at all. Jefferson was never on the bench; but he had been on many legislative committees, notably on that appointed to draft the Declaration of Independence, which sat behind closed doors.

As the judges in England gave their opinions orally, sometimes two or more judges would express their views separately; but the practice involved no principle; and when opinions came to be written out, and were, after due deliberation, agreed to by all of the judges, *seriatim* opinions usually became superfluous. If Jefferson's plan had been adopted our law books would have been greatly increased in number; and now when we look at our groaning shelves and waning space we easily reconcile ourselves to the fact that his recommendations were not adopted. His objections are principally interesting as showing his appreciation of the abilities of Marshall, whom he evidently regarded as the autocrat of the bench.

Jefferson seems to have been deeply imbued with the sentiments expressed by Mason, Henry and Grayson in the Virginia Convention. They objected to almost every grant of power contained in the proposed Constitution of the United States on the ground that it might be

abused. According to that view the Articles of Confederation, which gave to Congress the mere right of solicitation, furnished the most perfect system of government ever devised.

One of the methods proposed by Mr. Jefferson for correction of the errors of the Supreme Court was "by a strong protestation of both Houses of Congress that such doctrines advanced by the Supreme Court are contrary to the Constitution; and if afterwards they relapse into the same heresies, impeach and set the whole adrift."<sup>1</sup>

Another plan proposed by Jefferson was that the judges should be appointed for six years, subject to re-appointment by the President, with the approval of both Houses.<sup>2</sup>

Again he said:

"I deem it indispensable to the continuation of this government that they (the judges) should be submitted to some practical and impartial control; and that this, to be impartial, must be compounded of a mixture of State and Federal authorities."<sup>3</sup>

If such a commission could be raised it is not clear how the impartiality of its members could be guaranteed. As politics are managed at present the prospect would be dark indeed.

Jefferson never accused the judges of corruption; but at one time he seems to have thought them insane. He said:

"I repeat that I do not charge the judges with wilful and intentional error, but honest error must be arrested where its toleration leads to public ruin. As for the safety of society we commit honest maniacs to Bedlam,

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<sup>1</sup> Ford, Writings of Jefferson, Vol. X, pp. 192, 198, 199.

<sup>2</sup> Id., Vol. X. p. 198.

<sup>3</sup> Id., Vol. I, p. 112.

so judges should be withdrawn from their bench whose erroneous biases are leading us to dissolution.”<sup>1</sup>

On one occasion he frankly admitted their honesty. He said:

“Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power and the privileges of their *corps*. Their maxim is *boni judicis est ampliare jurisdictionem*; and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control.”<sup>2</sup>

The so-called maxim that it is the duty of a good judge to increase his jurisdiction is most likely the solemn jest of some ancient and irreverent wag made at the tavern after the adjournment of the court. By increasing their jurisdiction judges increase their labors without increasing their salaries; and, as our judges are usually greatly overworked and pitifully underpaid, they are naturally not greatly inclined to usurpation of unconceded jurisdiction. Jefferson might have remembered that in the case of *Marbury v. Madison*, which gave him so much offense, the court declined an extensive jurisdiction expressly conferred by Congress. Within our own time the jurisdiction of the Federal courts has been greatly increased, notably by the fourteenth amendment; but the evil of usurpation of jurisdiction without legislative authority, or in defiance of law, as apprehended by Jefferson, has not been manifested.

Jefferson easily foresaw that the Supreme Court might not always be right, and he sought for some method of correcting any errors that it might commit; some tribunal which he called “impeccable,” for final supervis-

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<sup>1</sup> Ford, Writings of Jefferson, Vol. I, p. 113.    <sup>2</sup> Id., Vol. X, p. 160.

ion. Alas, the impeccable tribunal has never existed in this world. Compared with a search for it the search for the philosopher's stone was reasonable and encouraging. Among a race where such an ideal body might be created, probably no tribunals of any kind would be needed. The days of miracles — as well as the days of chivalry — are over.

It is impossible to escape from the maze of human error. We should all agree that the Supreme Court has not always been right, though we could not agree on the proofs. Its opinions, tried as by fire, are put to the severest of tests hundreds of times every day. Its judgments are always in evidence, and are examined with microscopical analysis; whereas the acts and aberrations of the other departments, exacting but little consistency, often pass almost unnoticed, or are soon forgotten. The founders did not expect infallibility; they only made a choice between evils. The court does not claim infallibility. In the tropical luxuriance of modern life new vistas open continually, and the law must change to meet new emergencies. Old principles must be expanded or contracted, or abandoned, as need may require. Law and government contain too many speculative elements to admit of stability or of ideal accuracy; and there is no standard of highest excellence. Our conceptions of the law fluctuate; and the ablest jurists entertain a wholesome fear of rigid definitions and of exact formulas. It is only the impostor that is always right. The Supreme Court has often admitted its own errors, and has retraced its steps; and this is the highest achievement which our destiny admits — the correction of inevitable mistakes — and it is in the willingness of the court not only to examine, but to re-examine, that we must largely rest our



hopes. Of course in extreme cases the Supreme Court can always be turned down by constitutional amendment.

Judge Chase had shown on the bench a party spirit that seemed to be wholly inconsistent with that impartiality which is necessary for the proper administration of justice; but his impeachment failed because two-thirds of the members of the Senate could not be mustered to support a conviction. Jefferson favored such a change in the Constitution as would allow a conviction on the vote of a mere majority of both Houses of Congress; and he contended that errors of opinion should constitute ground for removal.<sup>1</sup> This would in effect have given an appeal on all legal questions from the Supreme Court to Congress, complicated with proceedings for the removal of offending judges. As Congress is not necessarily made up of men learned in the law, and professes to be no more than a political body, changing its complexion with partisan vicissitudes, it seems quite evident that this proposed device, if adopted, could only lead to confusion and disaster.

It is obvious that Jefferson had transferred to the Supreme Court a part of the animosity that he entertained towards its Chief Justice, and that his theories were not consistent. He declared that each of the departments of government should be independent; and yet he favored plans that would have made the judiciary entirely dependent on the legislative department. But the proper corrective, as Jefferson thought, lay in the fact that members of Congress are elected for fixed periods; and that the fear of popular condemnation is always suspended over them like the sword of Damocles. But popular verdicts are not always right, as any one who

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<sup>1</sup> Ford, Writings of Jefferson, Vol. X, p. 198.

has run for office and has been defeated will testify. Popular sentiment is proverbially variable, and is subject to sudden alterations. To-day the multitude cry "Hosannah," and to-morrow "Crucify him!" Congress and the President are the outcome of popular elections, and if they were infallible the restraining influence of the Supreme Court would not be needed.

It is clear enough that Jefferson's theories, if carried out, would have destroyed the independence of the judiciary; and, if there is anything disclosed in the lessons of Anglo-Saxon history, it is equally clear that an independent judiciary, finally established in England by the Act of III. William and Mary, is the firmest support of law and of personal freedom.

Mr. Jefferson frequently expressed the fear that the liberties of the country were endangered by the Federal judiciary. He said:

"The great object of my fear is the Federal judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them."<sup>1</sup>

Sentiments of this kind have been so often repeated that many persons really suppose that our liberties may be endangered by the Supreme Court. But that tribunal cannot take the initiative in anything. Its influence is purely negative. It may restrain; it cannot accelerate. It is a shield and not a sword. At the worst it can only condone illegal acts of others; but if it prevented the perpetration of unconstitutional acts by the other departments or by the States only one time out of ten, it

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<sup>1</sup> Ford, Writings of Jefferson, Vol. X, p. 185.

would still have its reason for being. Whatever it improperly permits would be done if the court did not exist. Experience has demonstrated that it is much less apt to encroach on the States than Congress or the Executive. No revolution has ever been begun by the judiciary. Judges are naturally conservative because the law is so; and they have nothing to gain and everything to lose by civil strife or by rash experiments.

The necessity for the rule laid down in *Marbury v. Madison* has been amply confirmed. It was the boast of Chatham that though the rain and the wind might enter the hovel of the English peasant, the King could not enter; nevertheless every British subject holds life, liberty and property in absolute subjection to the will of Parliament. With us the government is one of limited powers. There is a vast area inaccessible to its exactions; and the humblest suitor may at any time challenge the authority of President or Congress, or both combined.

Under all forms of government we must sooner or later reach a finality. If not the king it must be somebody else; and the Supreme Court, composed of learned men, quite excluded from the pale of actual or practical politics, having control neither of the sword nor of the purse, has as many chances in favor of ability and impartiality as any ultimate tribunal that has ever been devised. It can only act within a limited sphere; and by the framework of our institutions aggression on its part is impossible. What acts did Jefferson refer to as constituting the "unalarmed advance?" The decisions in *Marbury v. Madison* and *Cohens v. Virginia*; and yet neither of these has seriously "engulfed" public liberty or deprived the States of any valuable right.

It must, however, be said that Jefferson's objections to

the jurisdiction of the Supreme Court to annul the acts of the other departments as being in violation of the Constitution were not so plainly erroneous as they seem to us now. He was not alone in his opinions, but was sustained by intelligent statesmen in all of the States. There were only a few State precedents for the exercise of such an imposing jurisdiction. English precedents were all against it. The Constitution conferred no such express power, and hence for the strict constructionist it did not exist.

In *Marbury v. Madison* the court base the decision on the ground that when an act of Congress conflicts with the Constitution, the latter, being the fundamental and higher law, must prevail. But in *Luther v. Borden*, 7 Howard, 1, it was held that there were various political acts of the President which the courts had no right to review. The court say: "It is said that this power in the President is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which the power would be more safe and at the same time equally effectual."

If this doctrine were expanded a little, and should be extended to Congress, it would overthrow the rule prescribed in *Marbury v. Madison*.

No doubt at first it must have appeared most singular to see seven judges in their black robes sitting in a room in the basement of the Capitol, which John Randolph called "the cave of Trophonius," passing on the validity of laws enacted by Congress in the full enjoyment of its high prestige and authority as representatives of the people.

But it is needless to pursue the subject farther. Next to

the formation of our government the decision in *Marbury v. Madison* is perhaps the most important event in our history. It established the only distinctively original principle in our institutions. It did not erect an infallible tribunal, because that is impossible; but it provided for a peaceable settlement of questions of the most disturbing character and smoothed the way for harmonious intellectual and economical development. Slavery was by the terms of the Constitution excluded from national control, and the result was a civil war of unparalleled proportions and ruinous results. Time has amply vindicated the irresistible logic of Marshall, against which the tremendous influence of Jefferson could make no impression, and which nothing else has been able to shake. Since the rule was established we have had nearly a hundred State conventions that have formed State constitutions; but not one has departed from the principle asserted in this great case decided a century ago, or has in the least impaired the power of the courts of last resort to define the exact constitutional limits beyond which legislative and executive power cannot go. Such unanimity in public sentiment is probably without historic parallel.

Had the case been decided otherwise, our Constitutions, State and Federal, would have been mere ropes of sand. Every department of each might have had its own code of constitutional law, all equally authoritative. With our forty-five States this would be confusion worse confounded. We should have neither unity, harmony nor perpetuity; for a house that is divided against itself cannot stand. Anarchy and the South American system of pronunciamientos must have been the result. Very recently the Australian Confederation has given its sanction to the principle announced in the *Marbury* case.



The bar may look back upon this important piece of history with a sentiment of honest and unmixed pride. It is required that all the judges of the courts of last resort shall be men learned in the law. Hence they are all men belonging to the legal profession; and to them has been thus solely entrusted for a century the most responsible duty of guarding in their last sanctuary the lives, reputation, liberty and property of every citizen by enforcing constitutional restraints solemnly devised for their protection. Never has there been any secular duty so delicate, so high or so holy; the confidence thus reposed in our profession, surpassing anything previously known, should awaken feelings of gratitude; and should stimulate us to endeavor to render it in every way worthy of the honor thus confidently and generously conferred. It may be that the victories of peace are usually less renowned than those of war; but they are also far less costly and less cruel. Many questions that have divided the minds of patriots and of statesmen, and that have distracted the country, have been quietly adjusted by the courts without a drumbeat, without a march of a battalion, or the shedding of a drop of blood. Such victories as these are at least beyond the reach of disparagement. To the bar and to its representatives is assigned this most far-reaching task, requiring for its performance great abilities, with profound learning, a keen sense of justice, perfect uprightness, accomplished statesmanship, and a vision undimmed by passion or prejudice; examples such as the best training and discipline of the bar can alone supply. A good bench is the emanation of a good bar; and hence the responsibilities of the bar even in matters solely relating to good government are weighty and incalculable.

Finally there was some collision between Jefferson and Marshall, growing out of the trial of Aaron Burr. In 1800 Jefferson and Burr ran on the same ticket for President and Vice-President. As the law stood at that time the candidate receiving the highest number of votes became President, and the candidate receiving the next highest number became Vice-President. As Jefferson and Burr received an equal number of votes the election was thrown into the House of Representatives, where the Federalists held the balance of power. Burr had only been placed on the ticket on account of his local influence, no one intending that he should be made President; but he secretly intrigued with the Federalists to supplant his leader. In this proceeding he was thwarted by Hamilton, who favored his old enemy Jefferson, whom he knew to be honest, rather than Burr, whom he knew to be dishonest.

Long before Burr engaged in his wild undertaking to re-enact the part of Napoleon on the Western Continent by making himself emperor of Mexico, Jefferson had learned of his intrigues against him in the Presidential election of 1800. Whether this circumstance had any influence on the conduct of the trial is only a matter of conjecture. All that we can say is that Jefferson urged the prosecution with the utmost vigor. He no doubt regarded Burr as a very dangerous man. In a special message sent to Congress on the subject he included an extract from a letter from General Wilkinson. During the course of the trial Burr applied to the court for a subpoena *duces tecum*, directed to Jefferson, commanding him to bring the letter into court, stating that he had demanded a copy of it in vain. Chief Justice Marshall, presiding in the court with the District Judge, Griffin, granted

the prayer of the defendant. Jefferson complained of this act of the court bitterly. He wrote to Hay, the District Attorney, that his business as President required his presence at Washington, and that he could not be forced to go to parts of the country as distant as Richmond to testify in the courts.

I have lately seen an address by a distinguished speaker laudatory of Marshall, treating this decision, however, as clearly erroneous. In this conclusion I am unable to agree. The court only awarded a writ for the production of the paper, and did not decide that it would require the personal attendance of the President. The letter did not purport to be a public document. The way was left open for any objections or reservations that the President might make. No one in this country is above the law; and it is an alarming doctrine that if a private paper happens to get into the custody of the President, a person accused of crime may be hanged because it is inaccessible to him and to the courts.

The result of the proceeding was that the letter was sent to the District Attorney, to be held subject to the order of the court. Apparently Burr discovered that he did not want it; at least, it was not offered in evidence on the trial.

Partisans endeavored to cast blame on Marshall for the acquittal of Burr; but the prosecution for treason broke down completely. However reckless and wicked the enterprise of Burr may have been, there was no pretense that there was any proof of the alleged overt act of treason against the United States by Burr within the jurisdiction of the court. If he had been convicted he would have been a martyr; and he fell far short of deserving such an honor. He was reserved for a worse fate. Though

acquitted, the trial showed him to be so worthless and unprincipled, so made up of duplicity, that this man who had come within one vote of filling the seat lately occupied by Washington, became a wanderer and an outcast.

Though I think that in his contest with Marshall and the Supreme Court Jefferson was quite in the wrong, yet that fact hardly detracts from the commanding position he holds in American history. He failed in other things that were worthy of success. What misfortunes would not have been averted if he had succeeded in his efforts to stifle African slavery in its infancy! He was a man far and away ahead of his age. He alone of the men of his time perceived the true value of popular education, and for that he labored unceasingly. He devised as an inscription for his tomb: "Here was buried Thomas Jefferson, author of the Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia." These were titles enough for fame. Nothing was said about his having been twice elected to the highest office in the gift of the people. Nothing about the Louisiana Purchase, which doubled the extent of the territory of his native land; nothing about the exploring expeditions by which he laid the foundation for the acquisition of the Oregon Territory, and opened the gateway to the Pacific. He failed in trying to establish a decimal system of weights and measures; but his hand is seen in our monetary system and in the surveys of the public lands, as well as in many other things. If these achievements may count for anything he was one of the greatest benefactors, one of the most successful promoters of civilization that the world has ever seen. Men will perhaps always differ about his political opinions; but our contemporary historians who

seek to blacken his character by repeating the campaign lies of 1800 and 1804, the most virulent period of our political history, underrate the intelligence of the American people, the bulk of whom have not yet ceased to venerate the great founders of the Republic, who conceived, planned and carried into successful execution the most colossal enterprise recorded in the annals of mankind.

After the lapse of so many years, now that the smoke of the conflict has been blown aside, we can see that Marshall and Jefferson labored along converging lines for the upbuilding of our country, and for that advance of civilization which marked pre-eminently that illustrious century, the close of which we have been permitted to behold. The builders may not entirely agree, but the rising temple reveals in its magnificent proportions the plan of the Architect. So may it ever be.



## STATE OF NORTH DAKOTA.

Commemorative exercises on Marshall Day were under the direction of the North Dakota State Bar Association. Both branches of the General Assembly and a large concourse of lawyers and citizens assembled at the capitol in Bismarck. Governor White presided. After an invocation and vocal selections the President introduced as the orator of the day J. M. Bartholomew, former Chief Justice of the Supreme Court of the State of North Dakota.

### Address of J. M. Bartholomew.

We meet upon an occasion for which no parallel can be found. The people of the United States join hands to-day in paying homage to the memory of a noble man, to the works of a mighty mind. We select this, the centennial anniversary of the day upon which that man entered upon the duties of his great office, as a day well fitted to commemorate his life.

There is in our human nature an element that tends to hero worship. The military captain who amid the pride and pomp of glorious war, with undaunted personal courage and with ready and exhaustless resources leads an army to victory, commands our worship, and scarcely less he who with bold defiant utterances in senate hall or from the rostrum overcomes opposition and forces conviction even upon his opponents. With a century intervening, and understanding the unworthiness of his motives and the cruel injustice of ambitions, we yet wor-

ship as a military hero the first consul of France. A General Grant could make the circuit of this earth amid prolonged and continual acclamations because upon many a frightful field of battle he had proved himself the greatest military chieftain of his generation. An Admiral Dewey for one bold, brilliant and successful stroke in the far-away harbor of Manila was received upon his return by a nation with uncovered head and outstretched arms. Scarcely less do we worship the eloquence of a Burke, the fervor of a Webster, or the invective of a Calhoun. But he whose memory is here revered won not his laurels on the field of battle, though he was a soldier tried and true. He won not his everlasting fame in legislative halls, although a debater of singular force and persuasiveness. No, his name shall be ever immortal by reason of what he did in the seclusion of his own chambers. After days and perhaps weeks of profound reading and study he laboriously wrote out his thoughts and formulated the principles he desired to establish. No thought of applause, no thought of renown, no thought of future fame entered his mind. With singleness of purpose he sought to establish truth and justice. But in his earnestness he manifested a mind so clear, a logic so irresistible and a genius so incomparable, that, even in that age of mental giants, it was clear that as a jurist he stood without a peer. His thoughts still burn and spread, and to the principles that he announced we still turn as to an unfathomed fountain from which can be drawn the solution of every legal problem that concerns the powers or the interests of the Federal Government. We meet to-day to pay homage to that cold, unresponsive, intangible entity that we term intellectuality, but an intellectuality so grand and colossal that it

will cease to be admired only when mankind ceases to be governed by reason and convinced by logic.

The review of such a life will present to the tender youth of to-day every inducement that leads to more vigorous exertions and to higher attainments, every inducement that leads to all honorable ambitions, every inducement that leads to the highest type of the free and sovereign American citizen. And there are none among us, however many be our years or however high or however low be our station, who will not by the contemplation of such a character be raised to higher planes of intellectual and moral life.

The learned orator here sketched the private, public and political life of Marshall down to the time of his appointment as Chief Justice, and then continued:

With the end of the administration of John Adams the government passed from the hands of the Federalists. But near the close of his term, and on January 31, 1801, he appointed John Marshall as Chief Justice of the Supreme Court, and four days later — one hundred years ago to-day — Marshall took the oath of office and entered upon the discharge of his duties. We may not presume that either President Adams or John Marshall appreciated at the time the measureless importance or consequences of the appointment.

“God moves in a mysterious way  
His wonders to perform.”

Looking backward over our history for a century, can another instance be found so clearly manifesting the controlling hand of an all-wise Providence? Had Chief Justice Ellsworth retained his office until March 4, 1801, John Marshall would never have been Chief Justice.

Thomas Jefferson, strict constructionist that he was, would never have placed Marshall in that position. The opportunity was given to Adams and the man had been prepared for the place. It is no extravagance, it is but the iteration of a plain fact, to say that of all then living men John Marshall was best fitted to be Chief Justice of the United States. It was not the profound and astute common lawyer that was then needed. Rather it was the combination of jurist and statesman who loved his country, and his whole country, and whose mind was limited by no State lines. Who would love his country more than he who fought for its independence, than he who early declared that America was his country; and who could love the Constitution more than he who exerted his every effort to bring it into operation and who had since nursed it as a tender child; and who so well fitted to correctly interpret that Constitution as he who in its defense had been forced to scrutinize the meaning of its every word and line? All these conditions were happily blended in John Marshall. But Providence had not there stopped his equipment. Its greatest gift to the man was his unanswerable logic and the power that his pure, earnest, candid life gave him over men with whom he was called upon daily to associate. Most fortunate is it for us, most fortunate for this land, that John Marshall was thus gifted. Judges are but men. They go upon the bench carrying with them their existing political principles and political bias. Nearly all great constitutional questions have a direct political bearing. In their solution the judges carry with them their political principles, and are always inclined to that construction that conforms to their political views. This is no reflection upon their integrity. It simply shows the sincerity

of their convictions. We have more than once in our day seen our honored Federal Supreme Court divide practically, and sometimes exactly, upon party lines. Now, it so happened that during nearly all the thirty-five years that John Marshall was Chief Justice a majority of the court were opposed to him politically. Yet we find very few cases where the court divided, and no great constitutional questions when John Marshall spoke for the minority. So strong were his arguments, so keen his logic, so great his influence, that we find judges of opposite political faith joining with him in his broad, strong, comprehensive views of the Constitution. It is certain that had he possessed average powers only he would have spent most of his time in writing dissenting opinions, while the opinions of the court would have established rules of construction for our great charter that no patriot dares now contemplate. It was the conviction of John Marshall that the Constitution made, and was intended to make, this country a Nation complete and strong in all its parts, an indivisible Nation capable of protecting itself from within and from without. To his mind no construction of the Constitution was permissible that would conflict with its great purpose. He carried his associates with him. His rules of construction brought out the force and beauty of the Constitution, the power and cohesiveness of the Nation it created.

If I say that it was nothing but John Marshall's construction of the Constitution, accepted by the people and enforced by the government, that enabled the Nation to live from '61 to '65, let no one say that I give him too great praise.

Professor Bryce says of him that he was so singularly fitted for the office of Chief Justice, and rendered such



incomparable service in it, that the American people have been wont to regard him as the gracious gift of a favoring Providence. In so saying he speaks only the truth. He further says that "his fame overtops that of all other American judges more than Papinian overtops the jurists of Rome, or Lord Mansfield the jurists of England." When it is remembered that America has produced Story, Kent, Shaw, Grier, Gibson, this language is praise beyond limit. Our own James A. Garfield said: "Marshall found the Constitution paper and he made it power; he found it a skeleton and he clothed it with flesh and blood." To understand how strictly true is this picture we must go back one hundred years. The Constitution had been discussed, learnedly, bitterly discussed, in conventions and legislative halls. But such discussion had only emphasized the wide diversity of opinion as to its real meaning. No important provision in it had ever been judicially construed when John Marshall donned the ermine of Chief Justice. The whole field was unexplored. The world had seen written constitutions, but never such as this Nation had adopted. No such complex and dual form of government had ever been put into operation. The world had never seen sovereign States theretofore disrobing themselves of so much of their sovereignty as was necessary to create another sovereignty superior to and absolutely independent of themselves, for all the purposes of its creation, yet powerless and possessing no sovereignty beyond those purposes. But the extent of those purposes, the limits of those powers, were yet to be judicially determined. The relations of these States to each other, and to the Federal Government, and the relation of each to the Indian tribes, were yet to be defined. The limits of the power of the differ-

ent branches of the Government, now so clearly marked, were then uncertain and shadowy. It was no mere figure of speech to say that the Constitution was paper. It was as yet little or nothing more. Our fathers had launched a vast ship of state, but it was constructed upon no model, and all its machinery was yet to be tried, adjusted and made to work harmoniously. It was to this task that John Marshall addressed himself, and it was the admirable manner in which he performed the task that has made his name enduring.

It has often been noted and commented upon by lawyers that in his leading opinions upon constitutional questions John Marshall quoted but few authorities. He might have accounted for this by saying that written constitutions had not thus far in the world's history been brought to the bar of an independent, untrammelled judiciary for construction. But that I conceive was not the true explanation of the fact. His associates frequently cited authorities which they deemed cognate. But John Marshall conceived that in a matter of such direct interest to every citizen of this Republic as the construction of their own new and untried charter, the people ought not to be required to accept the doctrines of some foreign court; but that the grounds and reasons for the Constitution ought to be stated in language so clear, and based upon logic so unanswerable, that the construction could neither be rejected nor questioned. To that end he bent all his great powers, and the constitutional opinions written by him stand to-day for perspicuity and conclusiveness without peers in the law volumes of the world. Slowly, as case after case was brought before the high tribunal over which he presided, he unfolded his views and brought out the beauty,

the flexibility and the capability of the Constitution. It was a fundamental principle with him that the United States was a government with certain expressly granted powers and with certain necessary implications. That is to say, when he found express power given to do a certain thing, he reasoned that it must have been the intention of the Constitution-framers to grant power to do all those things incidental and necessary to the exercise of the power expressly granted. From that reasoning grew the doctrine of implied powers,—a doctrine long combated, but now universally conceded, and a doctrine which really gave the Federal Government as great strength by reason of its implied powers as by reason of powers granted in terms.

The orator here commented upon the Dartmouth College Case and the Bank Case, and upon Marshall's services in 1829 as a member of the Convention to revise the Constitution of Virginia. After quoting from Marshall's speech in that Convention the famous utterance, "I have always thought, from my earliest youth until now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary," the orator concluded as follows:

Would that these words might be engraved as with a pen of fire upon the heart of every American voter. In the ultimate analysis, upon your courts rest both your liberties and your country. What matters it how perfect be your Constitution, how free your laws. If the instrument of their enforcement be ignorant or corrupt the body politic is sick unto death.

I have not mentioned John Marshall's domestic life.

It was his brightest ornament. The oldest of fifteen children, he never had angry altercation with brother or sister. Of him his father said the son never caused him real anger. A devoted husband for more than fifty years. His wife's death preceded his. In his own language "her sainted spirit fled from the sufferings of life." His respect for woman amounted to reverence. In his presence the ribald tongue was hushed and the name of woman sacred.

At the ripe age of eighty years, racked with pain but clear of mind, his mighty soul broke the shackles and returned to its God. When he was born a favoring Deity culled from the treasure house of Heaven the choicest sentiments of domestic love, the rarest flowers of patriotic devotion, the brightest gems of genius and the sacred gift of statesmanship, and, uniting them in one person, placed upon his head an immortal crown and stamped upon the crown the name of John Marshall.

## STATE OF SOUTH DAKOTA.

The State Bar Association, at its meeting in October, 1899, appointed E. A. Hitchcock, Thomas Sterling and N. B. Reed a committee to arrange for the suitable commemoration of Marshall Day. The committee selected the Honorable Bartlett Tripp as the orator of the occasion. His address was delivered in the hall of the House of Representatives of the State Legislature, February 4, 1901, at Pierre, in the presence of the Chief Executive and other officials of the State, both houses of the Legislature, the Supreme Court, members of the State Bar Association, and the public. We give the address of Judge Tripp to the extent that space permits, omitting for lack of room detailed reference to particular cases and certain matters fully covered in preceding addresses.<sup>1</sup>

### Address of Bartlett Tripp.

In the great and important crises of every Nation, the Divine Ruler has always shown his beneficence to its people by bringing forth men fitted for every emergency, who, by their wisdom and ability, have so impressed themselves upon occurring events as to make the chronicles of their lives the history of their country and to immortalize their names as the heroes and patriots of their times.

During the greatest crisis in American history, amid the stirring events preceding the American Revolution,

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<sup>1</sup> The address of Judge Tripp will be found in full in the official report of the proceedings of the State Bar Association, 1901.



John Marshall was born. He came not like a meteor flashing across our national sky, but like a distant star he approached our universe and became one of the brightest gems of our American Constellation, a primary planet of our solar system. He was not a genius inferior in all other qualities that he might be superior in one. He possessed all those qualities which make men really great: honesty, patriotism, ability.

He who has never read and studied with care that important period of our country's history succeeding the Revolution, including the adoption of the Constitution and the earlier administrations of the new Republic, can never fully appreciate the wisdom and patriotism of those who created and brought into successful operation the machinery of our National Government and the importance of the act that made John Marshall Chief Justice of its highest court.

It was an era of the Republic which needed in each department of the government the ablest and most patriotic men. We had emerged from the war of the Revolution victorious in fact, but weakened and impoverished, and almost humiliated in our inability to meet public and private obligations which were demanding immediate fulfillment; our commerce had been swept from the seas; our manufactures had been crushed in the infancy of their development; agriculture had declined to its lowest ebb; and the entire country prostrate before the marching and countermarching of hostile and destructive armies, was but beginning to emerge from the ravages of one of the most bitter and relentless wars that has ever been the fate of a civilized race. The Confederation which never possessed any power other than that of recommendation, which more often degenerated into supplication for

action on the part of the States, was now powerless and inactive. Every provision recommended for the payment of interest upon the public debt had been refused, and the obligations incurred for the relief of the half fed and half clothed army in the field were now declined in the markets of the nation and of the world to one-tenth of their nominal values. Petty ambitions and jealousies between the States also weakened the bond of union already too weak, and it required all the firmness, patriotism and influence of Washington and his immediate friends to obtain from the States resolutions favoring a convention to devise a form of government which should be so far national as to rescue the people from the internecine strife into which State and individual competitions and partisan contentions were fast plunging them. The history of that noisy and turbulent convention, held together at times only by the wisdom and forbearance of Washington himself, is known to him only who has studied the debates, which have been but imperfectly preserved, and the biographies of the great men who took part therein. To such student the wonder grows how so creditable, so remarkable a fundamental law could have been evolved from such a babel of debate. "They builded better than they knew." They builded better than it would have been possible to have built had one-half of the builders known the strength of the structure they had reared. The contest which was on in every village and hamlet between those who contended for the sovereignty of the State and the supremacy of the Nation found its active adherents on the floor of the Convention. The motive which actuated the large majority of the delegates was undoubtedly to give to the Nation the smallest number of powers possible for the maintenance

of a union of the States and to retain to their sovereignty every power not so expressly granted. Many of the delegates desired nothing more than a continued alliance of federal colonies, and not a few, it is safe to say, believed that the Constitution that was finally adopted was but a mutual compact which the State had power in the exercise of its sovereign rights at any time to dissolve.

Very unlike were the arguments used in the different State conventions in the construction of the provisions of the Constitution in order to obtain its favorable consideration; and it is safe to say they were very unlike the meaning given to them by the final construction of the courts.

The Constitution was adopted, and during the Federalist administrations of Washington and John Adams but few of its provisions reached the courts for construction. It was in itself one of the most remarkable documents that ever issued from a deliberative body. It was a compilation of compromises. Each of the contending parties obtained for itself the largest amount of advantage in favor of the State and of the Nation. It has been said, "Nobody liked all its provisions and everybody feared some of them." It was a mere skeleton of government, purposely brief, with sufficient ambiguity to insure elasticity of construction from future courts and administrations. It was a plan of government without details or specifications to guide the constructor in the completion of the design. John Marshall was the executor and elaborator who corrected the defects in its construction, and under whose hand and by whose wisdom and genius was evolved and brought into successful administration the most perfect system of government the world has ever seen; and this is said in no vein of egotistical exaggeration or mere national pride — conservative writers

have ceased to style our government an experiment but frankly admit its strength, symmetry and elements of perpetuity. Mr. Bryce quotes with approval the language of Judge Cooley in his address before the American Bar Association, 1886, in which he says: "In matters of government America has become the leader and example for all enlightened nations." (1 Am. Commonwealth, 302.) And it is a matter of pride that we have seen the patriotic little republic of Switzerland gradually fashioning and moulding her style of government into form more and more resembling our own; and recently the new confederation of Australia has paid us the high compliment of modeling its whole structure of national and local government to correspond with ours, rather than that of the parent country.

But the constitution which we so much admire, the Magna Charta of the great republic of which we speak and think with so much pride, was not the work of a week or a month—not the mere product of the discordant elements of an inharmonious convention. It is the gradual development of a splendid theory of government derived from colonial and confederate experiments under which the foundation of our freedom was laid and our independence achieved. The Constitution was not made, it grew. Mr. Bryce says: "The Constitution of the United States is almost as truly the matured result of long and gradual historical development as the English Constitution itself." (1 Am. Commonwealth, 298, note.)

The idea of complete separation of the three great departments of government was not wholly original with the framers of the Constitution; it was derived from theories partially adopted by the Colonial States, from the commentaries of Blackstone, and from Montesquieu's

Spirit of the Laws. And the value of adopting tried rather than untried experiments of government is illustrated by the miserable failure of theory in engrafting upon the Constitution provisions new to the Colonial and Federal governments, among them the institution of the Electoral College intended to take the election of President out of the sphere of partisan politics; but so contrary to theory has the practice become that it would be almost treason for an elector to vote contrary to the nominations of the party that elected him.

The office of Vice-President has degenerated from the second place in the government to that of a mere sine-cure except in case of the death of the President, while the Speaker of the House, in matter of fact, under the rules of legislation as they now exist, is, next to the President, the most important office in the government. The Senate, by reason of its co-ordinate executive powers in matters of confirmation, is no longer the dignified House of Lords after which it was patterned, but a most important factor in administrative as well as legislative affairs; while the courts, as we have seen, have exerted an influence and control over the other great departments that would have startled and paralyzed the founders of our government.

Mr. Bryce says: "History knows few instruments which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity." (1 Am. Commonwealth, 363.) And again: "The Constitution has been largely made through construction rather than mere interpretation." (*Id.* 368.)

Mere interpretation by the strict construction of a court of precedent would have narrowed and dwarfed the Constitution to the limits designed by the adherents



of the States, and, in result, we should have followed the theory of Jefferson, who declared the purpose of the Constitution to be: "To leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected the citizens of foreign or other States; to make us several as to ourselves, but one as to all others." (4 Jeff. Works, 373.)

Bacon's statement "that as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated," and that other maxim, *expressio unius est exclusio alterius*, were strenuously invoked to detract from and weaken the powers granted to the General Government by the Constitution. On the other hand, it was contended that these rules could not apply with their full force to the construction of the Constitution, for if they did the denial to Congress of the power to pass *ex post facto* laws would give it the right to pass all others, or the power given to declare war would prohibit the right to make peace; it was, however, admitted, as was subsequently held by the court, that a reasonable application of such rules aids interpretation, and that the enumeration in the Constitution of the specific powers of Congress excludes the presumption of a general power of legislation, but that it does not limit the effect to be given to the powers actually granted.

It was further contended that the powers of the General Government were granted by the sovereign States, and, like the terms of all grants, must be strictly construed. On the other hand it was denied that any powers of the General Government were derived from the States, but from the people themselves; that the States had been given powers to be exercised, not to be conferred upon others, and that in the language of Webster referring to

the Constitution: "It was made by the people, for the people and is responsible to the people;" and that if a grant of power, it was not to be construed strictly like private grants and municipal charters which grant powers and prerogatives for local and private advantage, in which the many yield and give up privileges for the benefit of the few, but the reverse, in which the few surrender rights and privileges for the benefit of all, or rather they granted and allowed the representatives of the whole Nation to exercise rights and powers which had theretofore been exercised by the States and which could not be exercised by the people themselves.

By others, and by much the larger number, it was contended that the Constitution was a compact between the sovereign States and the National Government after the manner of compacts made between sovereigns and their subjects for the grant of constitutional rights. To this it was replied that the divine right of kings did not obtain upon American soil; that all power was vested in the people; that the State and Nation were but means and agencies for its exercise, and that the people could not make contracts with themselves. And also that the Constitution was neither a compact nor a grant, but a fundamental law of the Nation which the people in their sovereign capacity had made immortal and indestructible. As said by Chief Justice Chase: "The Constitution in all its provisions looks to an indestructible union composed of indestructible States." (*Texas v. White*, 7 Wallace, 700.)

The judge who was to settle these conflicting opinions and interpret a Constitution about whose meaning the framers themselves entertained so variant and antagonistic views must be a statesman as well as lawyer; he must be able to construct as well as construe; and to imply

rather than to supply, without by such implication marring the symmetry or violating the unity of the entire instrument he is called upon to construe.

After much consideration Mr. Adams appointed John Marshall to this responsible and exalted position, and he is reported to have said in later years, when he had had opportunity to know and appreciate the work of the great Chief Justice, that "his gift of John Marshall to the people of the United States was the proudest act of his life;" and John Q. Adams is reported to have said that, "If his father had never done anything else to deserve the approbation of his country and posterity, he could claim it of both as due to himself from this act alone."

The flatterers and sycophants of present greatness die with the season in which they live, but departed greatness leaves an impress upon the page of fame that no time can dim, no jealousy can efface.

Webster said of the Chief Justice: "There is no man in the court that strikes me like Marshall. I have never seen a man of whose intellect I had a higher opinion." Story, in his Eulogy on Marshall, after referring to his splendid opinions and the honor that came to the whole court from their rendition, says: "I confess myself unable to find language sufficiently expressive of my admiration and reverence of his transcendent genius." Again he says: "He was a great man. . . . I go farther and insist that he would have been deemed a great man in any age and of all ages. He was one of those to whom centuries alone give birth, standing out like beacon lights on the loftiest eminences to guide, admonish and instruct future generations as well as the present." And again he says: "While I have followed his footsteps, not as I could have wished, but as I have been able, at humble distances,

in his splendid judicial career, I have constantly felt the liveliest gratitude to that beneficent Providence which created him for the age, that his talents might illustrate the law, his virtues adorn the bench, and his judgments establish the perpetuity of the Constitution of the country." Mr. Bryce says of him: "Yet one man was so singularly fitted for the office of Chief Justice and rendered such incomparable service in it that the Americans have been wont to regard him as a special gift of favoring Providence. . . . The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him and them have continued in general to guide the action and elevate the sentiments of their successors." And again referring to the Chief Justice he says: "No other man did half so much either to develop the Constitution by expounding it or to secure for the judiciary its rightful place in the government as the living voice of the Constitution." (1 Am. Commonwealth, 261.)

Perhaps nothing better has been said of him by a layman than by Griswold: "To one who cannot follow his great judgments, in which at the same time the great depths of legal wisdom are disclosed and the limits of human reason measured, the language of just eulogy must wear the appearance of extravagance. In his own profession he stands for the reverence of the wise rather than for the enthusiasm of the many." Again quoting from Mr. Bryce: "His work of building up and working out the Constitution was accomplished not so much by the decisions he gave as by the judgments in which he expounded the principles of these decisions, which for their philosophical breadth, the luminous exactness of their reasoning and the fine political sense which pervades them, have

never been surpassed and rarely equaled by the most famous jurists of modern Europe or of ancient Rome." (1 Am. Commonwealth, 375.)

It was well that such a man was made Chief Justice at a time when there was no precedent to follow but precedents to be made. He was the Mansfield of his time, and what the latter accomplished in the great field of English common law, the former did in the new and untried fields of constitutional law; and as Mansfield was succeeded by Kenyon, the strictest constructionist of English law, so Marshall was followed by Taney, who always yielded to precedent rather than to his own great views of right. How fortunate for the Republic that the positions of the two great Chief Justices were not reversed.

Marshall came to the bench during the formative period of the great republic. It is true that it had nearly thirteen years of existence behind it, but during all of this time the Federalist party had been in power; no important question had arisen to create friction between the co-ordinate departments of the government; only one great constitutional question had been brought before the court for its determination, and but two or three times had any question involving constitutional powers challenged the attention of the court. The government was now entering upon a new era. The Republican party, representing the strict constructionists of the Constitution, had now come into power, and one of its first administrative acts brought from the Supreme Court by its Chief Justice an opinion that startled the administration and alarmed even the staunchest supporter of national sovereignty. *Marbury against Madison* is not only one of the ablest but one of the boldest and most



fearless opinions that was ever promulgated by the bench. The parties against whom process was demanded had behind them a strong party majority; encroachments of the National Government; assumption of undefined powers by the courts and the consequent delimitation of the powers of the sovereign States, were questions that had been discussed in the campaign and it was claimed had been determined by the people in the elevation of Jefferson and his party to power; and, emboldened by the confidence inspired by political victory, the new Secretary of State, Mr. Madison, declined to deliver commissions to officers appointed near the close of the former administration, which, though properly signed and sealed, had not come to the possession of the appointees. Marshall did not, however, fear to announce the views of the court, contrary as he knew them to be not only to the administration in power, but also to a large part of the thinking and intelligent people as well as to lawyers of standing at the bar.

The opinion, *dicta* though much of it is admitted to be, bears evidence of a careful and thorough examination of the powers of the court, the rights and duties of the executive officers of the government, and the relations which the several departments bear to each other in the administration of public affairs. The opinion took so wide a range and discussed all the great constitutional questions directly and indirectly raised by the issues, in language so plain and by reasoning so clear and convincing, that its most vigorous opponents could not deny the correctness of its conclusions and were obliged to content themselves with declaring that it was only *dicta* and not binding as a decision of the court. Almost a century has elapsed since the rendition of this

decision, and the *dicta* of Marshall in this case, which has perhaps been cited with approval and affirmed oftener than any other decision of that great judge, is still the law of that great court. That one bold, fearless decision did more to stay the wild vagaries of State supremacy than all the able pens of the great writers of that time. It was more than an argument, it was an able and conscientious adjudication of a great constitutional question by a supreme and co-ordinate department of a sovereign National Government; a judgment and decision couched in such plain and simple language, supported by reasoning so irresistible, and terminated by conclusions so unavoidable, that it carried conviction and compelled obedience. Marshall was from now on Chief Justice, and the great court over which he presided was the Supreme Court of a sovereign Nation. Questions of great interest multiplied and were appealed from every portion of the States.

The orator here briefly commented upon some of the leading judgments of the Chief Justice,—among others, *Sturges v. Crowninshield*, *M'Culloch v. Maryland*, the Dartmouth College Case, *Loughborough v. Blake*, *Cohens v. Virginia*, and *Gibbons v. Ogden*, and then proceeded:

These are only a few of the more novel and important questions which Marshall had to meet and determine. They were cases of first impression. No precedents existed to guide the court in their decision, for constitutional law was an experiment, and no court had ever before been called upon to construe fundamental law, nor to decide that it had jurisdiction so to do. England, who was our great prototype and who furnished the model for the outline of our government, had never permitted her courts to presume to declare an act of Parliament to

be in contravention of her Constitution. Her courts were the creation of the kings and of Parliament and their powers were confined to construction. They were not given, as is sometimes urged against our courts, the power of destruction. The boasted Constitution of England is but laws made sacred to the people by age and tradition. It is presumed that Parliament will not violate Magna Charta or other provisions of England's so-called Constitution, but "Parliament is Omnipotent," and no power exists that can legally determine when those sacred rights of the people have been violated, and no power but revolution could prevent their repeal. Lord Coke, it is true, has said in referring to the British Constitution, that "acts of Parliament contrary to reason are void;" but Blackstone, answering this time-worn quotation, says: "If Parliament will positively enact anything to be done which is unreasonable, I know of no power that can control it." (1 Bl. Com. 93.)

Chief Justice Marshall then could not hope to find in England or other countries, in all of which either the legislative or executive department is supreme, any precedents to aid him in construing the provisions of a written constitution.

He was not a mere lawyer who came to fill the office of Chief Justice of the United States. He was not learned in form and precedent that would give him standing in a foreign court. He had not that encyclopedic learning from which the court could draw at will in determining what the law is, but he was great enough and courageous enough to declare what the law ought to be. He could expand as well as expound the skeleton provisions of the Constitution, and was able to work out the theories of the great men who framed that instrument with the knowl-

edge that it must be adopted before it could be expounded.

Experience has taught us that the strength of our government exists in the separation of its great co-ordinate departments and in the clever adjustment of the checks and balances provided by the Constitution. The exercise of a final appellate power or discretion finds its lodgment somewhere in every government. In despotic governments it belongs to the King; in constitutional monarchies to the Parliament; hence the popular expressions have obtained: "The King can do no wrong;" and "The Parliament is omnipotent;" but under our republican form of government the fathers ventured upon the untried experiment of transferring this power, so far as it concerned the rights and liberties of the citizen, to the courts, and a hundred years of unexampled progress and advancement have shown the wisdom of their action.

The courts have absolute power to review the action of every department of the government and to declare such action null and void whenever it is in violation of law and the rights of the citizen are invaded. This extraordinary power of the courts, which it is believed the framers of the Constitution themselves did not fully comprehend, is no longer viewed with alarm by the people but rather with feelings of appreciation and commendation. It has been invoked in times of danger to restrain anarchy; in cases of riot to overcome armed mobs, and in times of peace to protect right against popular clamor and social wrong. Where could such a power be more safely lodged than with the courts? The men who compose our courts are trained lawyers and less likely to be swayed by passion and prejudice than the men who fill the offices of the executive and legislative departments

of the government. The courts are constitutional arbiters who can decide but can gain no personal advantage from their decisions. They can prevent or direct the action of others, but cannot themselves assume to act. They can overthrow, but cannot usurp. They can sustain, but cannot attain to any rights or advantages from the thing sustained. Real danger from the acts of others arises from the motives that prompt their commission; if unselfish, unless the acts of a madman or a fool, they are seldom wrong.

So apparent is this becoming to the law-abiding people of our country that not only has criticism become disarmed but we have come to look upon our courts with confidence and reliance against government encroachment and individual aggression. It is a lesson of the hour that we are now calmly listening to a cold legal argument before the final tribunal of the Government upon the same questions which in the late political canvass wrought us almost to a white heat of political and partisan prejudice, and we are listening to obey; and when the judgment of that great court is rendered, it will be obeyed with such alacrity as might lead a stranger to wonder whether any American citizen ever entertained an opinion different from that promulgated by the court. Some one has said that our Constitution and Government were based on the theology of Calvin and the philosophy of Hobbes; and Bryce says: "It is the work of men who believed in original sin, and they were resolved to leave open to transgressors no door which they could possibly shut."

It is undoubtedly true that from their experience in the past the people of that day had come to look upon a government as an embodiment of tyranny and upon the



Constitution they were framing as a network of chains and shackles with which they hoped to bind the tyrant and make it subservient to their will. Experience has, however, taught them that they, the people, are the Government, that the officers of the State and Nation are their agents and servants, and that the prison house, as they regarded the edifice which the convention erected, has come to be esteemed as their temple of liberty and they now devoutly worship at its shrine.

How little danger of liberty can there be in a popular form of government where the officer and office are both subject to the control of the people. Judge Johnson well expresses it in *Anderson v. Dunn*, 6 Wheaton, 226: "The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger." Despite the theories of pessimists and the vaporings of demagogues, there was never a time in our history when the Nation was as strong as to-day.

The great astronomical metaphor of the American panegyrist is to keep the centrifugal and centripetal forces in equilibrium, so that neither the planet States may fly off into space nor be drawn by the sun of the central government into its consuming fires. The danger has never been from without but from within; not a danger from too strong a coherency of the whole but from an incoherency of the parts. That was the disease with

which the Republic was afflicted during the early period of its existence; it gave evidence of virulence at the time of nullification and became epidemic at the time of the Rebellion. We have settled forever these vexed questions, not only by decisions of the highest tribunal of the Nation but by appeal to the arbitrament of arms, the last and highest court of resort known to the nations of the world. We are a Nation, and as a people we have outgrown our pride of locality; the petty jealousies so long existent between States and the parts of the common country are fast disappearing. Homogeneity consequent upon the rapid development of trade and commerce between the States, improved methods of transportation and almost instantaneous interchange of thought will soon forever do away with every trace of local envy and prejudice. The natural hostility to tyranny of government which engendered a fear of encroachment on the part of the legislative and executive departments of the Government, and a demand for increased limitation in the fixed and rigid provisions of a written Constitution, and the anxiety excited by the assumption and exercise on the part of the courts of new and unexpected jurisdictions, have already disappeared and in their place have developed, with patriotic growth, a love of our common country, a pride in our National Government, and a sincere reverence for the Constitution and Flag which find utterance in the proud exclamation, I AM AN AMERICAN CITIZEN.

## TERRITORY OF NEW MEXICO.

Exercises commemorative of Marshall Day were held at the instance of the Supreme Court of the Territory in the Hall of the House of Representatives at Santa Fe, on the evening of Monday, February 4, the Hall being elaborately decorated for the occasion. The Supreme Court of the Territory and both houses of the Legislature, which was then in session, attended in a body, and the assembly room was filled with leading and representative men and women from all parts of the Territory. Chief Justice Mills, in introducing the orator of the day, said in part:

### Address of William J. Mills.

When this court called the attention of the New Mexico Bar Association to the proposed national celebration of John Marshall Day, and suggested that steps be taken fittingly to commemorate it, that body at once saw the importance of the event and immediately responded, and this meeting is the result of the action of the Court and the Bar Association, and I, as Chief Justice of our beloved Territory, have been selected to preside.

I now desire on behalf of the court and the Bar Association to express my thanks to both branches of the legislative assembly of the Territory for the marked courtesy which they have shown in loaning us this beautiful hall for this occasion, and also to them and other territorial officials for their having honored us with their presence.

In presiding over this meeting which is to do honor to the memory of the greatest jurist which this country has

ever produced, it is not my intention, nor would it be proper for me, to enter into an analytical discussion of his life, character and achievements. This pleasant duty is assigned to the other speakers who will address you, particularly the orator of the evening, and I doubt not that they will do their subject ample justice, and that you will later listen to a rare literary treat. I shall, however, in a cursory manner, detail to you something of the life and career of John Marshall. . . .

John Marshall was not the first of our Chief Justices. Both John Jay and Oliver Ellsworth had preceded him, and they were distinguished and able men. Why then do we not celebrate the centenary of their ascending the Bench rather than that of the third Chief Justice? The answer is, because the Bench and Bar recognize his eminent fitness for the place he so ably filled, and because his decisions on constitutional questions in the various cases which came before the court for adjudication were such that in a great measure they pointed and marked out the future course which the great Republic had to follow. His interpretation of the Constitution gave to the several branches and departments of our government the power and authority which have made us the Nation we are.

I am not one of those who believe that if Marshall had not ascended the Bench we would now be but a confederation of States, with each at liberty to do practically as it chose. If such had been the case, disorder and anarchy must have followed, and the American people would have had to amend the Constitution or have adopted a new one so as to have secured a stable and strong government; for Americans, realizing that it is liberty, love protection to life and property above all else. But Mar-

shall, by his decisions, saved the trouble and disorder which must have followed, and showed that the written Constitution was an instrument sufficiently strong and elastic to answer our needs. Our people have reason to bless him, for by giving the government strength enough to rule, he saved us from disorder and possibly a dictator. . . .

I cannot do better than close these brief introductory remarks by quoting the tribute which Story paid him: "His genius, his learning and his virtues have conferred an imperishable glory on his country, whose liberties he fought to secure, and whose institutions he labored to perpetuate."

#### **Oration of Frank Springer.**

If it be considered in the light of the results which have followed, the most important event of modern history was the American Revolution and the separation of the colonies from the mother country. It was an event to which the people of this country recur with growing pride as the years go on. Societies of Sons of the Revolution and Daughters of the Revolution have grown up, in which a membership is now considered equal to a patent of nobility. The heroic efforts of our Revolutionary forefathers, their courage in battle, their fortitude in defeat, the privations they endured, and their perseverance through the weary years of that memorable struggle, are engraved upon the most sacred tablets of our history, and are known as household words to young and old alike. The example which they set has not been lost upon their successors. The flag which they unfurled has been upheld in honor, on land and sea, until the names of the American soldier and the American sailor have



become synonyms for courage and efficiency the world over.

But in these particulars the event to which I have alluded was not unique. The annals of history are full of the deeds of brave and patriotic men, who staked their lives freely in the cause of liberty, both in unsuccessful rebellions and successful revolutions. That which did give to the achievement of our fathers its momentous significance was not what they destroyed, but what they built up. Out of the chaos of strife they brought the order of enduring government. Of all human achievements in the science of government, I consider the American Constitution the greatest. It is so great, indeed, that there is nothing else with which it can be compared. Not but that there have been other governments wisely ordained and happily administered. But they were the products of time and gradual evolution. Here a new experiment was undertaken. A complete system of republican government was reduced to writing and set in operation among a people just emerged from monarchy through the demoralizing ordeal of war.

The foundation rock on which this matchless fabric of government was built was the idea of the Union. To adopt it in theory was no easy task. Here were a number of States, with every possible diversity of conditions and of interests. They all had governments of their own, and were inflated with the pride of sovereignty. The smaller ones were slow to yield their individuality, and the large ones did not want to forego the advantage of their preponderating representation. But the wise and patriotic men of the convention, admonished by the dangers of the Confederation, in all the compromises to which they yielded, held fast to a central idea, which con-

verted the Confederation into a Nation; established a clear line between State and National powers, confining the one to matters of local and domestic concern, and extending the other to all those in which the people became an integral unit among the nations of the earth. The sovereignty of the people as a whole was lodged in a single, concrete organization, with power enough to confine its component elements to their proper spheres, and with unity of purpose and execution sufficient to maintain its course as a whole in contact with other nations. Discipline and concerted action — the qualities which alone make armies formidable — were applied to make out of discordant and unequal elements a powerful State. Something new was created. The people found themselves under a new name, in a new garb, brought together by a tie which was unfelt before, with fresh aspirations, enlarged possibilities and a definite place among the nations of the earth. It was the Union. Without this result, the Revolution would have been a failure. Without it all the lives given for that sacred cause, all the toil and suffering of the fathers, would have been a useless and cruel sacrifice. Better, a thousand times better, that the colonies had remained under the dominion of England than that their independence had been followed by the establishment of a lot of rival, jealous and warring petty governments on this continent.

The greatest achievement for us of the century just closed is that the conception of a complete and perfect Union, wrought by the patriotism, forbearance and wisdom of those great men, has at last been realized in fact. When we reflect upon the difficulties which surrounded its organization, and the deadly perils through which the Union has safely passed, we may well recognize the

hand of an overruling Providence, which has led us from a small beginning, through trials and dangers, to become a nation whose masterful energies and mighty power bid fair to dominate the world, not for conquest, but in the arts of peace and for the betterment of peoples. It has passed the stage of theory. Men do not now discuss the expediency of maintaining the Union, or the possibility of its dissolution. It has come to be, as the fathers designed and hoped, the dominant idea of our statesmanship, the dearest of all our possessions, the pride and glory of our people.

May this grand conception live on. May it grow as the nation grows, animating the statesman and the soldier alike, until it shall permeate and possess the entire people; until it shall be no longer a mere idea, but shall become a deep and abiding sentiment, enveloping the land with its patriotic impulses, binding the people together with the ardor which belongs to religious belief, and in whose presence dissension and discord shall vanish; until in the heart of every citizen there shall grow up and abide, not as an image of marble, but as something that lives and sheds its warmth afar, consecrated to their veneration and their worship, inspiration of youth and solace of old age, symbol of majesty and power, infallible and eternal, the sublime image of the Republic.

Having in view the perpetuity of the Union, the crowning feature of the plan of government thus evolved by the fathers was the independent judiciary. In an elective government the greatest danger to the people comes from the people themselves. Against all other dangers they are ready to present a united front. But when stimulated by interest, or blinded by passion, they are the first to forget the laws they have made, and they need

but slight excuse to violate or set them aside. There is no tyranny so great as that of a multitude, and no power so lost to the sense of responsibility. Hence the need of some institution that should be above the passions of the hour; which should represent, in garb of authority, the best there is of wisdom, calmness and dignity in human character; which is competent to uphold the laws against the tyranny of faction, and to deal justly on every occasion, "whether the cause, the question or the party be popular or unpopular."

Such was the design and the theory of the Supreme Court of the United States. Composed of judges with a life tenure, looking to no one for continuance or security of their position, endowed by the Constitution with the most ample jurisdiction to pass upon all questions which might be raised by the States among themselves, or with the National Government, it was plainly the arbiter of the destinies of the Union. Its theory was perfect, but it would have failed of its purpose most lamentably if its jurisdiction had not been early established in practice consistent with its theory. In the possibility that this might not be done, lay one of the gravest dangers that ever imperiled the maintenance of the Union. It is a fact that again suggests the idea of a guiding hand, that in every great crisis or peril with which this Nation has been confronted, some man with powers adequate to the occasion — the man of the hour — has been raised up from among the people to meet it.

When John Marshall became Chief Justice of the Supreme Court of the United States, one hundred years ago to-day, the times were not encouraging. Discontent was prevalent in every quarter.

That at such a juncture a man of Marshall's tempera-

ment and mental equipment should have been placed at the head of the judicial department of this government seems like something more than mere good fortune. He was a man in the prime of life and in the full maturity of his powers. His earliest notions of the science of government were gathered from good old Father Æsop's fable of the discordant sons and the bundle of rods. He believed that a living union was better than a thousand theories. He had been a soldier throughout the Revolution. He had fought at Brandywine and had starved at Valley Forge. He knew what the Union had cost, and he felt what it was worth. He believed in the supremacy of the Constitution, and he understood it as well as any man. His masterly arguments to his fellow Virginians in favor of the ratification of the Constitution had been among the potent influences in persuading the people of that imperial and reluctant Commonwealth to come into the Union. He believed that the office of government is to govern; that the worst danger which besets a free people is their own unbridled passions; that liberty without law is tyranny; that the tyranny of a multitude is worse than the tyranny of one. He believed in the rules of logic; and in his hands they became weapons so powerful that they not only overcame opposition but beat it down and destroyed it. In such contests there was nobody who could cope with him on anything like equal terms. He believed in a government of logic and by logic, as opposed to a government by passion and caprice. He dominated those around him by the power of his intellect, so that in legal literature it is not uncommon to find allusions to the "dictatorship of Marshall," when referring to his relation to the rest of the Supreme Court.

It was with such an intellectual equipment that he



came to the head of that great tribunal, whose powers were without precedent in all history, in good time to encounter theories of government which were to him like old enemies, supposed to have been dead and buried and honorably laid away among the compromises of the Constitutional Convention, but which had escaped from their coffins and were lined up again for controversy in a court whose sentence was destined to put them at rest. They came up for consideration in a series of cases which brought into requisition the greatest legal talent of the American bar. The questions presented were new to the science of jurisprudence. They resulted in a line of decisions unparalleled for their logical force and consummate ability, which at once raised the Supreme Court of the United States to an eminence of dignity and authority never before conceived for a judicial tribunal.

It is not my purpose to trace the history of those questions in all their technical aspects. But I wish to point out that as to those which I have especially in mind, every one of them vitally affected the stability and permanence of the government, and contained within itself the seeds of dissolution of the Union. Marshall seized upon the first occasion which arose to announce the principles governing the relations of the co-ordinate branches of the government, and to declare, in bold and unmistakable terms, the functions and powers of the court.

Is an act of the Executive subject to inquiry by the courts? Yes, when vested rights are affected and its duties are specifically assigned by law, but not in matters within its discretion.

Are the acts of Congress subject to review by the judicial branch? Yes, when they are repugnant to the Constitution, because they are void and not law.

Both these were startling propositions to the men of that day. Nobody had ever heard of a court questioning an act of Parliament, and the only appeal from unwarranted executive or legislative acts before known was an appeal to arms. Yet when viewed in the light of the reasoning put forward in support of the decision, it became plain to all citizens that it was not only sound, but that no other conclusion was possible if the theory of our government was to be maintained.

Next came the question whether the States, by laws or the acts of their courts, could block the wheels of justice in the National courts.

Can the State legislatures annul the judgments or determine the extent of the jurisdiction of the courts of the United States?

Can the judicial process of the Federal courts be controlled by the laws of the several States?

Then followed a still graver question:

Can a State impede or control, by taxation or otherwise, the lawful institutions and measures of the National Government?

The question came up in various other forms:

Can a State, by exclusive concession, control the navigation of waters within or contiguous to its borders; or can it, by imposing licenses or duties on goods imported into the State, influence or regulate the foreign commerce of the United States?

All these questions, and many others involving in a less vital degree the relations between the State and National governments, were grappled with and settled by a series of decisions which have contributed, to an extent not at all appreciated, because to a large degree ignored by the current histories of the country, to the

security and consolidation of the government, and to the restraint of the centrifugal forces which tend to rend it asunder. There is nothing in language that could more aptly characterize the action of the court in its treatment of these great constitutional questions than the words of the great chancellor, from whose Commentaries most of us gained our first knowledge of constitutional law, James Kent, who says: "I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of National and State sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of States in peace and harmony, by the ability, the moderation, and the equity of its decisions."

So self-evident do the doctrines thus early enunciated by the court appear to us now, and so firmly have they become impressed upon our legal traditions, that a superficial critic might conclude that no transcendent qualities were required to discover and declare them. But we have only to examine the history of the controversies out of which they arose, the decisions of the State courts whose judgments were reversed, and the arguments of counsel in some of those great cases, to see how easily it might have happened, in the hands of weak and illogical judges, or of demagogues catering to the political passions of the hour, that the opposite contention would have become the law, and that the Union, instead of the mighty power we behold it now, would have again become the rope of sand of the Confederation.

The great merit of Marshall, and the enormous service he rendered to his country in these adjudications, was

not alone in the fact that the decisions were made as they should have been made, but that he was able in every case to expound the reasons for the decision with such masterly skill and convincing power that opposition was silenced. The country accepted them. The majority of the people were satisfied with them; and to the bar, as every student of the legal profession soon finds out, they stand as landmarks in the history of American jurisprudence, as immovable and imperishable as the pyramids of Egypt. There is little doubt that permanent harmony and peace within the Union would have been secured through these and other decisions of the Supreme Court, if it had not been for the slavery question, which was beyond the reach of courts and laws, and for whose solution there remained only the trial by battle. That which I have mentioned is but a small part of the judicial career of Marshall. Suffice it to say that his labors on the bench embraced almost every branch of jurisprudence relating to human duties and rights, and that whatever he touched he left upon it the impress of a master.

We are accustomed to honor our military heroes. We know the history of the battles and sieges in which they shed undying luster upon our arms. The glorious deeds of our army and our navy are as household words to us. We are justly proud of the renown which they won for themselves and for us. But it is most fitting, and most creditable to the intelligence and discrimination of the American people, that they are now beginning to recognize other heroes besides those who reveled in carnage and death, and are ready to give some attention to the lives and characters of men like these, whose services to their country in other walks of life have been no less im-

portant. If this Republic endures longer than those of antiquity, it will be chiefly by reason of the controlling influence of that great court which maintains the equilibrium of the Nation; which holds together the Union like some great central sun of a planetary system, sending its light to the remotest parts, allowing each member to move unrestrained in its appointed path, but binding all by its mighty force, so that they can neither collide with each other nor depart from the system. To have been the master spirit in the evolution of this unique institution, from the stage of theory to the position of universal acknowledgment and homage, is fame enough for any man.

The greatest heritage transmitted to succeeding ages by the greatest republic and empire of antiquity was its system of laws. Her forum and her temples are in ruins. But there has come down to us, untouched by the hand of time, one of the grandest monuments of human wisdom of any age — the *Corpus Juris* — the civil law of Rome.

In a conspicuous place in the City of Washington there stands a noble statue of Marshall. The citizens of succeeding generations, as they pass that spot, may pause and reflect upon the character of this intellectual giant, whose firm features and massive brow are depicted in enduring bronze. Near by, and towering high above it, on the scene of his mighty labors, rise the marble walls and majestic dome of the Capitol — in architectural beauty and commanding aspect the most imposing structure upon earth — one which in its noble proportions and grand design typifies more fully than any other monument yet conceived the grandeur and dignity of the Republic. But these, like the forum and temples of Rome, will perish. Whether they be of marble or of bronze,



time will efface them, and they will crumble into dust. But the record which this great jurist wrote upon the tablets of the bench which he adorned will not perish. By force of his own intellect he reared a monument which will withstand "the waves and weathers of time," and which will endure as a firm rock, to which this great Nation may always cling for its safety and its perpetuity.

An address was also delivered by B. M. Read, Speaker of the House, concluding as follows:

**Address of B. M. Read.**

Marshall's decisions on national and international law have been the guides and landmarks of our ablest jurists from his day to ours. As a judge and statesman he has no superior, and probably no equal, unless the mighty Webster can be ranked as such. But even he, with all his profound learning and ability, and experience in every branch of jurisprudence, never attempted to criticise unfavorably one of the decisions of the great Chief Justice, and so there they stand unassailed and impregnable, to enlighten the jurists of the future as they have those of the past. When Marshall was appointed Chief Justice New Mexico was merely an outpost of the Spanish empire, and it is now preparing to occupy an honored position in the sisterhood of American States, while Spain in the mutations of time has disappeared from the Western Hemisphere, and I, in behalf of the people of our beautiful Territory, pledge their heartfelt love, allegiance and devotion to the peerless Republic which John Marshall did so much to dignify and adorn. On behalf of the honorable body over which I have been chosen to preside, and by whose authority I have spoken, and as a

member of the learned profession in the practice of which Marshall reached the zenith of well-earned fame, I offer this tribute of respect and reverence to the cherished memory of the immortal Chief Justice.

E. A. Fiske, President of the New Mexico Bar Association, also delivered an address, in which he said, in part:

**Address of E. A. Fiske.**

To be great among the great; to be the pre-eminent figure in such a body as the Supreme Court of the United States in the broad light of a hundred years of criticism by his own countrymen, now among the most numerous and powerful as well as the most observant and intelligent of the civilized world, is the highest test of merit as a jurist, and that test may truthfully be claimed for Chief Justice John Marshall.

After reviewing Marshall's great constitutional judgments, he concluded as follows:

But to attempt to measure the debt the people of this country owe Chief Justice Marshall by a recital of all the constitutional constructions in favor of law and in restraint of arbitrary power he has left to guide his grateful countrymen, would in itself be a commentary upon the most important principles the Constitution of the United States contains; and, with the brief time of this meeting allotted to the Bar Association of New Mexico, which I now have the honor to represent, I cannot better close my remarks than by again quoting, with the earnest approval of myself and my brother members of the bar, from the pages of that eminent English statesman and author, Mr. James Bryce, his glowing eulogy upon Chief Justice Marshall, written when the merits of the life labors of that great jurist had been tested by the critical scrutiny of the intellectual world for more than fifty years.

## STATE OF CALIFORNIA.

In California Marshall Day was observed with fitting ceremonies at San Francisco, Oakland, San Diego and Los Angeles, under the auspices of the several Bar Associations of those cities.

The San Francisco Bar Association appointed Van R. Paterson to move the adjournment of the Supreme Court of the State, Charles Page that of the United States Circuit Court of Appeals, J. C. Campbell that of the United States Circuit Court, Milton Andros that of the United States District Court, and W. S. Wood, William H. Fifield, Barclay Henley, Paul Neumann, Jesse W. Lilienthal, W. H. Alford, Robert Ferral, Philip G. Galpin, M. B. Kellogg, Crittenden Thornton, Jeremiah Sullivan and District Attorney Byington to move the adjournment of the twelve separate departments of the Superior Court of the city and county. All the courts above referred to adjourned for the day.

The main ceremonies, however, occurred at the banquet of the Association, which was attended by over two hundred members and guests. Warren Olney, President of the Association, presided and made a suitable opening address, introducing, among others, James D. Phelan, who spoke on the theme, "The Reign of the Law." Addresses were also delivered by Franklin K. Lane, T. B. McFarland and J. A. Cooper, but only the addresses of the latter two gentlemen have been preserved. Judge McFarland, in response to the sentiment "The Opportune Appointment of John Marshall as Chief Justice," said:

**Address of T. B. McFarland.**

In my opinion, no act — no one single, independent act — of any President of the United States, from Washington to McKinley, has resulted in more blessings to the American people than that act of President John Adams by which he commissioned as Chief Justice of the Supreme Court of the United States, John Marshall of Virginia. No one can tell what misfortunes might have befallen us if that appointment had not been made, and made at that particular time. I know that there is a certain philosophy which teaches that great men have had no material influence on their times. The disciples of this philosophy say that all history is merely the result of a sort of automatic movement which they now call — after the prevailing fad of the day — “Evolution,” but which would be better named “Fatalism;” and that things would have been just as they are if great historical characters had never appeared. I beg to ask, how do they know this? Do they know that English history would have been the same if a score of great Englishmen who could be named, from William the Conqueror down, had never existed? Do they know that modern French and European history was in no material manner affected by Napoleon? Would German unity have been accomplished without Bismarck? Are they sure that the American Revolution would have been successful without Washington? Can they even say with entire confidence that the result of our Civil War would have been the same without Lincoln at the head of the Government and Grant at the head of the Army?

And, taking a wider view, can they say that the mediæval and modern histories of vast peoples and nations of the Orient would have been the same if Mahomet had

never been born? And further, would they dare to say that the histories of the nations of Western Europe and their offshoots on this Continent would have been the same if the founder of Christianity, whether they consider him as a human or divine character, had never appeared on this earth? It is also sometimes complacently said that "the right man always appears at the right time." This, like many other pleasant sayings, is not true. When the right man did appear at the right time, there was generally success for the cause which he espoused; when the right man did not appear there was failure. Many a great enterprise has failed because, for want of a strong man at the helm, the tide which might have led on to fortune was not "taken at its flood." Many a long and well-established dynasty has disappeared because the scepter finally descended to the hands of a weakling prince who could not hold it. Nations have lost their independence, or have sunk to lower levels of national importance, because at critical moments there was no great patriot with wisdom and courage and genius enough to gather up and properly wield the resources of his country. If, when Oliver Cromwell died, Richard Cromwell had been—not, indeed, another Oliver, which could hardly have been expected—but if he had been a man of average prudence and courage and strength, the Stuarts would not have returned, and the rulers of England would probably have been for many generations descendants of the great First Lord Protector; and who can say that the government and history of England would not have been materially changed by such events? Therefore, notwithstanding this sombre philosophy of fatalism, let us rejoice that at a critical moment in the history of our country the right man did appear at the right time in the person of John



Marshall. Who can say that the creation of this great American Nation out of jarring and discordant States would have been accomplished if he had not been Chief Justice during the perils of the formative period?

It is curious to notice that the appointment of Marshall was the result of a sudden combination of circumstances which in the natural course of events might not have occurred. In the first place, it was made possible only by the resignation of his predecessor, Chief Justice Ellsworth; and that resignation was an event entirely unexpected until about the time it occurred, and was itself the result of extraordinary circumstances. Ellsworth had been Chief Justice only about five years; he was not at all an old man, his age being at that time, I think, about fifty-five years; he suffered somewhat from ill health, but not enough to interfere with the performance of his official duties; and down almost to the date of his resignation there was no apparent reason why he should not continue to be Chief Justice for many years to come. But our relations with France were then in a very critical condition, and in the latter part of 1799, President Adams, against the advice of most of his friends, sent three Envoys Extraordinary to Paris, and insisted that Ellsworth should be one of them. Their voyage to Europe was a very stormy one; they were compelled by stress of weather to land on the coast of Spain, and to make an arduous journey overland through Spain and France to Paris; and the hardships of these travels aggravated the disease from which he suffered, and permanently undermined his health. Still he intended to return to the United States in the latter part of 1800, and it is not known whether, if he had returned then, he would have resigned. However, his physician advised him against the winter voyage, and he concluded

to remain in Europe until the next summer, and to send his resignation to the President. Fortunately it was received in time for Adams to act on it during the last month of his administration.

It is uncomfortable to think what might have happened if the vacancy had not occurred until after the commencement of the administration of President Jefferson; for, notwithstanding the many admirable qualities of that distinguished man, he was one of the advocates of the doctrine of State's rights in the extreme sense, and of a strict construction of the Federal Constitution—a doctrine much more dangerous then than now,—and he was hostile to the National judiciary, and denied its most important claims to jurisdiction. He would most certainly have appointed a Chief Justice holding his own views. But as it was, no imperative reason impelled Adams to appoint Marshall. There were other men of his party whose standing in the legal profession was about as high as that of Marshall. He did offer the place to John Jay, who declined. Fortunately he finally settled on the right man. Who can say that any other man would have accomplished the great work done by Marshall? The office called not only for great talents, but for great virtues. Shakespeare says that “courage is the noblest virtue of them all;” and without courage of the highest order no man could have done his work. Many of the great questions which came before him as judge were unfortunately party questions, and had been discussed with the utmost partisan bitterness and rancor before the people, and in political bodies and by the public press; and it is always embarrassing for the judiciary to deal with such questions. There was no place there for a timid judge, though honest and able.

A majority of the men who led public opinion at that time were opposed to the views of the Federal Constitution which Marshall afterwards compelled them to accept as the law of the land, and which made us a Nation. They would have reduced the Federal courts to mere petty tribunals for the adjudication of a few private rights, and under their views those courts would not have dared to question the validity of an act of Congress, or a statute of a State, upon the ground that it violated the Federal Constitution. But the courage to declare what he thought the law was in the face of these embarrassments — of popular prejudice fanned to a flame, the calumnies of a virulent press, and the frowns of official power — thank God! Marshall had. But he needed more; he needed not only the wisdom to see the right, but the great power of statement and elucidation which fortified his decisions with reasoning which could not be answered, and which compelled assent; and it is fortunate for the American people that he had those great qualities to a degree never excelled by any jurist of this or any other country. And who can feel sure that another man would have exhibited these high qualities?

It is not practicable here more than to glance at the amount and character of the services rendered by Marshall, and their beneficial effect upon the country. Lawyers know in detail what he did; and among the people there is a good deal of general recognition of the value of his work. He made many wise decisions in various departments of the law; but, of course, his prominence as a public historical character is the result of his great opinions in cases arising in the realm of constitutional law. Gentlemen engaged in vocations other than that of the legal profession do not often read law books — and I

don't blame them for not doing so; it is folly for a business man to undertake to learn enough of the details of the law to be his own lawyer, and law literature is not very entertaining to a layman. But every intelligent American should certainly have some knowledge of the framework and general principles of the government of his country and of its judicial history. Marshall wrote a great many opinions on these subjects; but the perusal of a very few of them would be quite an education to the general reader. Whoever will read even four of those opinions — in *Marbury v. Madison*, *Fletcher v. Peck*, *M'Culloch v. State of Maryland* and *Gibbons v. Ogden* — will see how the foundations of this present American nation were laid deep and broad and firm and enduring by the master hand of Chief Justice Marshall.

The difficulties of his work can hardly be appreciated to-day, when the right of the Supreme Court of the United States to decide questions arising under the Constitution is universally recognized, and the power of the Nation is behind the court to enforce its judgments. He had first to establish the jurisdiction of his own court to determine constitutional questions; or, at least, he had to demonstrate that there was such jurisdiction; and he had, by his power of reasoning, to give force and vitality to its decisions on these questions in the face of hostility entertained by both Federal and State officials. There was quite a widespread notion that the Constitution was not a law in the usual sense of that word; that is, "a rule of action prescribed by a superior for an inferior, and which the inferior is bound to obey." For the first time our government was to be established under a written Constitution, and its provisions were accepted to a great extent as merely advisory or directory; but that an act of

Congress or a statute of a State in conflict with the Constitution should not be considered as binding as an act of Parliament passed in violation of what are vaguely understood to be English constitutional principles, and that a court in determining private rights could disregard acts and statutes of that character, was looked upon as a revolutionary doctrine not to be tolerated. Marshall, occupying the firm and conceded position that it is the province of a court to determine what the law is, held and demonstrated — what seems now to be so clear — that the Constitution was itself not only a part of the law, but the supreme law; that it prescribed a rule for the judiciary, as well as for the other departments of the government; and that when the act or statute in question was in conflict with or violative of the Constitution, it was within the power and was the duty of the judiciary to declare that it was not law, but void. Upon this principle alone could the National Government have been maintained. The English theory that certain principles of constitutional government were directed only to the conscience of Parliament — applied, as it was there, to one people who had grown up into one Nation — would have ended here in disintegration and ruin, where the problem was to create a new Nation out of thirteen distinct, independent sovereignties, jealous of each other, and of national power.

Moreover, it was necessary to determine what powers the General Government had, as well as what it did not have. By the Constitution Congress was granted certain enumerated powers; and as human language is at best imperfect, the terms of these grants were susceptible of different constructions. In addition to the enumerated powers, Congress was given authority to make all laws "necessary and proper" to carry into execution all pow-



ers vested by the Constitution in the government or any department or officer thereof. One school of construction, which included perhaps a majority of the leading men of the day, held that the language of the enumerated powers should be confined to its most limited meaning, and that the words "necessary and proper" could rarely have any application at all. This construction would have rendered the General Government a mere skeleton which would soon have passed into the region of fossil remains. Marshall decided and established the doctrine that particular clauses, when doubtful, must be construed in view of the general purposes of the Constitution as declared on its face; that by the Constitution the people of the United States, for the purpose of forming a more perfect union, insuring domestic tranquillity, promoting the general welfare, etc., clearly intended to create a government with powers sufficient for those ends, and that there should be no such narrow construction of its language as would cripple the government and leave it unable to accomplish the purposes for which it was clearly instituted; and that the language used, when fairly and reasonably construed, gives ample powers for the purposes contemplated by the people. Moreover, he established the law to be that the Constitution creates a tribunal for its own construction; and that whenever a question arises as to the power of Congress, or the want of power of a State, that question is to be finally decided, not by Congress, or by the Legislature of a State, but by the Supreme Court of the United States.

It is to be noticed, however, that his decisions never limited the legitimate rights of the States preserved to them by the Federal Constitution, or seriously impaired the virtues of that dual system of government under

which we live, and which, while it reposes in the General Government all matters of national sovereignty, allows each State to regulate those ordinary business, domestic and personal relations about which all of the people of this great country could not be expected to have the same notions and opinions. A rigid uniformity of law on all subjects, everywhere throughout our vast domain, would be irksome and dangerous. One of the great securities of our national unity is this flexibility as to local State government; and this safeguard is overlooked by many reformers who are urging national legislation upon subjects which should be wisely left where it is, with the States. Under this dual system peculiar circumstances will continue to present questions about which men will honestly differ; but the general principles which should always be applied are those which have been wrought out and declared and established by the wisdom, and the reasoning, and, I might say, the genius, of that illustrious judge to whose memory we this night do reverence.

What I have said presents a mere inadequate glance at the character and services of Chief Justice Marshall. There is no time to say more. In conclusion, I desire to declare that, in my opinion, to him more than to any other one man, in civil life at least, is due the existence of this present magnificent American nation, now united forever by a loyal national sentiment which "beats at its heart, throbs in its veins, and travels with the circling currents of its blood;" whose name is known and honored and feared everywhere on all continents and oceans, and on the remotest islands of the most unfrequented seas; and whose flag represents more of power, and at the same time more of liberty and individual human rights,

than any flag that floats, or ever floated, among the ensigns of nations.

Judge Cooper, in response to the theme "Marshall, the Great Judge and the Builder of our Constitution," after portraying his own ideal of what a judge should be and sketching Marshall's life and public services prior to his appointment as Chief Justice, said in part:

**Address of J. A. Cooper.**

Having given some of the attributes of an ideal judge, we find that John Marshall came as near filling the ideal as it is possible for mortal man to do. It was said by Robert G. Ingersoll in concluding his lecture on Shakespeare:

"Shakespeare was an intellectual ocean whose waves washed all the shores of human thought; on which lay all the lights and shadows; in which were all the tides, pulses and currents, and over which brooded all the calms and swept all the storms of which the human mind was capable."

This eulogy upon Shakespeare might well be applied to the judicial, clear and comprehensive intellect of Marshall.

On January 31, 1801, he was appointed by President Adams Chief Justice of the Supreme Court of the United States, and it was in this office that he achieved the great fame that has placed him among the foremost jurists of the world. He had by his labors done much to secure the Constitution and its adoption. He was now placed in a position to give it judicial construction, expound and develop it. "No other judge, it has been well said, has ever done half so much to develop and explain it, or to secure for the judiciary its rightful place in the gov-

ernment as the living voice of the Constitution.” His simple, unaffected mode of life and thought was the index to the character of the great man. In the interpretation of the Constitution he brushed aside all attempt at learning and applied the strong, common-sense, simple rules of construction. He laid down two propositions, which were adopted and followed by the court during his life, and have, since his death and up to the present time, been followed by the Supreme Court of the United States and all the higher courts of the land:

*First.* Every power alleged to be vested in the National Government or any organ thereof must be affirmatively shown to have been granted.

*Second.* When once the grant of a power by the people to the National Government has been established, that power will be construed broadly. . . .

The eloquent Everett said of him and of the Supreme Court:

“I do not know what others may think on the subject, but for myself, sir, I will say, that if all the labors, the sacrifices, and the waste of treasure and blood, from the first landing at Jamestown or Plymouth, were to give us nothing else than the Supreme Court of the United States, this revered tribunal for the settlement of international disputes (for such it may be called), I should say the sacrifice was well made. I have trodden with emotion the threshold of Westminster Hall, and of the Palace of Justice in France; I thought with respect of a long line of illustrious chancellors and judges, surrounded with the insignia of office, clothed in scarlet and ermine, who within these ancient halls have without fear or favor administered justice between powerful litigants. But it is with deeper emotions of reverence, it is

with something like awe, that I have entered the Supreme Court at Washington. Not that I have there heard strains of forensic eloquence rarely equaled, never surpassed, from the Wirts, the Pinkneys, and the Websters; but because I have seen there a bright display of the perfection of the moral sublime in human affairs. I have witnessed, how from the low dark bench, destitute of the emblems of power, from the lips of some grave and venerable magistrate, to whom years and gray hairs could add no new titles to respect (I need write no name under that portrait), the voice of equity and justice has gone forth, to the most powerful State of the Union, administering the law between citizens of independent States, settling dangerous controversies, adjusting disputed boundaries, annulling unconstitutional laws, reversing erroneous decisions, and with a few mild words of judicial wisdom disposing of questions a hundred-fold more important than those which, within the past year, from the plains of Holstein, have shaken the pillars of continental Europe, and all brought a million of men into deadly conflict with one another."

Marshall's decisions are contained in thirty of the earlier volumes of the reports of the Supreme Court of the United States. Among the celebrated of his opinions, after *Marbury v. Madison*, are those of *Dartmouth and Girard Colleges*, *M'Culloch v. Maryland*, involving the right of the State to tax the United States banks, *Sturges v. Crowninshield*, involving the constitutionality of State insolvent laws assuming to discharge pre-existing debts. This case has been immortalized by a poet for Halleck in *The Croakers*:

" — called from death by Marshall's power.  
The ghosts of murdered debts arise."



The most famous trial at which he ever presided was that of Burr for treason. It is a remarkable fact that during the thirty-four years he held the office of Chief Justice, in spite of the variety and difficulty of the questions before the court, he was overruled by his associates but once. Very few of his decisions have been criticised or departed from since his day, and criticism of them has rarely awakened any sentiment except astonishment at the critic's audacity. "His fame overtops the fame of all other American judges more than the fame of Papinian overtops the jurists of Rome, or the fame of Lord Mansfield the jurists of England." It is well said of him by a recent writer:

"He taught angry Presidents and partisan legislatures to bow to the authority of law. He made the Supreme Court respectable and respected. His character gave authority to its counsels and his intellect conferred reason on its judgments."

It is said that Augustus boasted that he found Rome of brick but left it of marble. Marshall found the Constitution unstable, attacked by Congress, the legislatures of the States, and its many enemies. He built it up column by column. He removed the sand from the weak parts and replaced stone.

### EXERCISES AT OAKLAND.

Eulogies of Marshall were made by George E. DeGolia, Secretary of the Oakland Bar Association, and J. H. Smith, President of that Association, and a fitting response was made by Henry A. Melvin, Presiding Judge of the Superior Court for Alameda County.

## EXERCISES AT SAN DIEGO.

At San Diego the day was observed with appropriate ceremonies. During the morning, designated members of the legal profession proceeded to each of the public schools and delivered addresses on the life, character and services of Chief Justice Marshall. In the afternoon a public meeting was held at the Opera House, where J. Wade McDonald delivered an extemporaneous address occupying an hour, and closed with the following peroration:

### **Address of J. Wade McDonald.**

Marshall was the prophet of empire, the genius of evolution, the divinely appointed and supremely endowed architect whose mind conceived the plan, and the master workman who laid broad and deep the foundations of our nationalism.

As the great poet-laureate sang of the eagle:—

“He clasps the crag with crooked hands;  
Close to the sun in lonely lands,  
Ring’d with the azure world, he stands.  
The wrinkled sea beneath him crawls;  
He watches from his mountain walls,  
And like a thunderbolt he falls.”

So, for more than a generation of men, John Marshall grasped with untiring mind and never-failing heart the solidarity of his country, and from the mountain tops of statesmanship, patriotism and legal acumen, watched the “wrinkled sea” of mistaken efforts to circumscribe the exercise by the Nation of the powers granted by the Constitution, and fell like a combination of thunderbolt and avalanche upon the detractors.

He found the Constitution a mere paper of unknown quality and undefined meaning; he left it a determinate

power. He took charge of it as a weak nursling; he brought it forth a virile, invincible giant. He found the framework of the Union open and weak; he filled the interstices with the cement of his constitutional constructions and welded the loose joints under the ponderous hammer of his irresistible logic.

He converted a mole of sand into an adamantine bulwark, against which in after years the waves of the fiercest and most tremendous civil conflict in history vainly beat, and that now proudly and securely sustains the grandest superstructure of human rights and progress and national power and prosperity that the sun illumines and the night enfolds.

The secret of his power lay not alone in his unexampled ability, but was the outgrowth of his exalted patriotism and comprehensive grasp of the highest qualities of statesmanship, combined with marvelously sustained concentration of all his powers in the line of his duty, as he saw it. And his personal qualities commanded the respect and confidence of all the world. He was unassuming, straightforward and pure, both in his public and private life, and possessed a refined, sympathetic nature that endeared him to all with whom he came in personal contact. He feared God, loved his country, respected man and honored woman. And without detracting from the affectionate designation of "Father of his Country," bestowed upon Washington, John Marshall is equally entitled to the appellation of "Father of the Nation."

### EXERCISES AT LOS ANGELES.

The exercises in Los Angeles were held at Blanchard Hall in the afternoon. The Superior and Federal courts adjourned in honor of the occasion. All the judges and

ex-judges, and almost the entire membership of the Bar, were in attendance, as well as citizens generally. The meeting was presided over by R. H. F. Variel, President of the Association, who said, in part:

**Introductory Address of R. H. F. Variel.**

The great men of our Nation have been not inaptly styled the beacon lights of its history. As we look down through the past century and a quarter we behold the great mass of our plain people, as Lincoln called them, represented by a wide plain, while a mighty mountain chain represents its great men. Still further we behold one mighty peak after another rearing itself in solitary grandeur, above the main range, typifying the characters and services of Washington, Hamilton, Adams, Marshall, Franklin, Madison, Jefferson and others of the wonderful men of that day; we may behold Webster, Clay and Calhoun, the illustrious trio of a later period, and Lincoln, Grant and Sherman of more modern times. Not the least among these—aye, not inferior to any of these—was John Marshall, Chief Justice from 1801 to 1835.

We have assembled to-day to commemorate the beginning of the greatest epoch in the life of this Nation, the beginning of its constitutional history, which dates from the inauguration of John Marshall as Chief Justice of the Supreme Court of the United States. It is for this reason that throughout this entire Nation, in every city of every State where a bar association exists, all State and Federal courts are closed in honor of this great man and greater judge, who for so long presided over the greatest tribunal that this world has ever known.

In honor of this intellectual and moral giant among the mighty men that our country has produced, and of

the work which he so perfectly wrought in his day and generation, the Bar Association of Los Angeles has asked you to listen to an address from a gentleman who has become distinguished as a lawyer at the bar of three different States—Hon. John D. Pope.

After sketching Marshall's life and career down to his appointment to the Supreme Bench, the speaker said:

**Address of John D. Pope.**

In 1801 Marshall became Chief Justice. He saw clearly that the Constitution had provided a tribunal to decide all questions that might arise under it, and he held to that doctrine steadily. In the case of *Marbury v. Madison* he decided that the executive departments of the Government in most of their duties were subject to the control of courts, and that acts of Congress not authorized by the Constitution were void. In the case of *M'Culloch v. Maryland* he decided that Congress had the power to establish a national bank if it considered such an institution necessary and proper to carry on the Government, and that the States had no power to tax their banks; that the power to tax carried the right to destroy, and the States could not destroy nor even interfere with the instrumentality of the National Government. In *Gibbons v. Ogden* he decided that an act of the Legislature of New York conferring exclusive right on Robert Fulton to navigate the waters of the State by steam was void, because Congress had the right to regulate commerce between the States and foreign countries.

It is a matter of wonder to us now that doubt should ever have existed as to the jurisdiction of the Supreme Court over cases arising under the Constitution and acts



of Congress. If a man were to get up in an assembly now and declare a contrary doctrine, the protests would be so loud that his voice could not be heard. And yet Jefferson and Madison strenuously contended that the States could decide questions that the Constitution committed to the Supreme Court. Although the court had declared a different doctrine, many people persisted in declaring that the States could decide whether the Government had exceeded its powers, and this led to the Civil War and the sacrifice of a million of lives and thousands of millions of treasure. Now everything is settled upon the surest foundations. Constitutional questions, everybody knows and admits, are to be settled by the courts.

Think what an immense advance it was when the thirteen sovereign States adopted a Constitution and inserted a provision by which all disputes that might arise between them could be peaceably decided. The Constitution, as adopted by the Convention and expounded by Marshall, contains the theory which, carried forward, will result in an international tribunal at which all disputes between nations shall be peaceably adjudicated. When this is done, universal peace will reign and wars will be no more.

The exercises concluded with a banquet at the California Club, at which addresses were made by W. J. Hunsaker, C. F. McNutt, Olin Wellborn, M. T. Allen, J. D. Works, James A. Gibson and Edgar W. Camp.

## STATE OF IDAHO.

Marshall Day was declared a legal holiday by the proclamation of Governor Hunt, in which he requested a suspension of the usual public business, that the courts close, and that the bar of the State observe the day by appropriate ceremonies. The State Bar Association of Idaho devoted the evening of its annual session on February 4, 1901, at Boise, in commemoration of Chief Justice Marshall. The President of the Association, Richard Z. Johnson, presided, and introduced as the speaker of the occasion James E. Babb, of Lewiston in this State.

### Address of James E. Babb.

The elaborate ceremonies which are taking place in almost, if not quite, every State in the Union, and at the National Capital, in honor of John Marshall, surpass all recorded testimonials to the name of any jurist and are not exceeded, unless in mere pomp and pageantry, by those accorded any American military chieftain. It is gratifying to citizens of Idaho, that, in a region which some members of the Constitutional Convention of 1787 thought would not be inhabited for a thousand years, we have a republican form of government, fully organized, the accompaniments and conveniences of civilization, and a patriotic feeling so quickened as to have made it fitting for the Governor to declare this a public holiday, for the commemoration of our illustrious Chief Justice. These circumstances confirm the eloquent statement of a distinguished member of our profession, that:

“Justice is the great interest of man on earth. Wher-

ever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors on this edifice, with usefulness and distinction, . . . connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society." (Webster's Works, II, 300.)

Let us review the life of John Marshall and seek inspiration from his public and private virtues, his patriotism, his varied talents and public services, so that we may walk with him, as we are admonished by the Scriptures to walk with God, and transmit his memory and influence unimpaired to succeeding generations.

Having noticed the earlier life and career of Marshall, and especially his part in the evolution, adoption and early construction of the Constitution, the speaker continued:

In May, 1800, Marshall received the appointment as Secretary of War, but before the Senate had time to act upon his confirmation, Pickering having resigned from the Secretaryship of State, Marshall was appointed and confirmed as his successor. While an incumbent of this office he carried on negotiations with France, England and Spain on the questions of neutrality and treaty rights of contraband impressment and ante-revolutionary debts. His correspondence upon these subjects, and more especially his instructions to King, our minister to England, have retained high rank as among the best accomplishments of the many distinguished men who have occupied the office of Secretary of State.

When a successor to Oliver Ellsworth as Chief Justice was to be appointed, Marshall first suggested Jay and then Justice Paterson, but the honor fell to Marshall. He was now forty-five years of age, and one hundred years

ago this day took his seat as Chief Justice at the first session of the Supreme Court held in the city of Washington. Prior to his elevation to this position the court had been in existence but eleven years. Mr. Hitchcock states that about one hundred decisions had then been rendered; only six of those involving constructions of the Constitution, and only one of the six was a case of large importance in constitutional history.

The next thirty years was to be a period of dramatic incident in the legal history of the United States. In fifteen of those years, fourteen acts of the legislatures of eleven different States were to be declared by the Supreme Court invalid because of violation of the Constitution of the United States.

In 1803 Chief Justice Marshall wrote the opinion of the court in *Marbury against Madison*, when it was announced for the first time by the Supreme Court that it had power to declare invalid an act of Congress because it violated the Constitution. Strange it seems now that this decision should have been the object of the most violent criticism. Difficult it is to conceive what would have become of the Union if the various legislative bodies had been unbridled and supreme in their times of passion. Their attempts, while becoming accustomed to constitutional restrictions, show that there was no right of contract, no vested right of property, no principle of harmony among the States, sufficiently sacred to stay them. The doctrine of *Marbury against Madison* had been declared previously by several different State courts, and denied by none. The first published opinion announcing this doctrine was that of the Supreme Court of Virginia, in *Commonwealth against Caton*, written by Chancellor Wythe in November, 1782. Iredell had announced the same view. Chase had also, saying that the Bar all were

so agreed. Marshall had maintained it in the convention of Virginia for ratification of the Constitution. It was opposed by the resolutions of the Kentucky legislature of 1798-1799.

In 1807 we find Aaron Burr, an ex-Vice-President, arraigned before Marshall on the charge of treason. The entire nation watched the trial with the closest interest. Public opinion was substantially unanimous in demanding a conviction. The people had prejudged the case. We may well imagine that Burr, the slayer of Hamilton, one of Marshall's warmest friends, must have entertained grave apprehensions as to the treatment he would receive upon a trial before the Chief Justice. No case ever called for a more rare display of judicial fairness, unswayed by an almost unanimous, popular verdict. The evidence disclosed that when the overt acts of treason relied upon by the Government for conviction were committed at Blennerhassett Island, Burr was not present or participating in those acts. To convict him it became necessary, therefore, to do so on a charge of constructive treason. The definition of "treason" in the Constitution under which he was being tried was that it consisted in levying war against the government, or giving aid and comfort to its enemies. The Constitution required at least two witnesses to the same overt act. Marshall held, upon the facts proven, that under the Constitution there could be no conviction. This ruling was a great disappointment to the people, and was at first received with much disapproval, President Jefferson being highly displeased. The construction of the constitutional definition of treason, however, has been generally accepted by jurists and constitutional lawyers, and Marshall's conduct in the case stands a brilliant and striking example of the responsiveness of his judicial conduct to the dictates of



his conscience and judicial judgment in entire disregard of the severe condemnation of an excited public opinion.

The speaker here referred to several of the leading judgments of Chief Justice Marshall, and their historical and political connections, viz., *United States v. Peters*; *Martin v. Hunter's Lessee*; *Sturges v. Crowninshield*; *Dartmouth College v. Woodward*; *M'Culloch v. Maryland*; *Osborn v. United States Bank*; *Gibbons v. Ogden*; *Georgia v. Cherokee Nation*; *Worcester v. Georgia*, and concluded his address as follows:

The limitations of this occasion will not permit a specific reference to more of Marshall's decisions, or to the many and varied interesting incidents of any of them. Those mentioned are but a few illustrations of his work in one branch of jurisprudence. Besides the cases involving constitutional questions, his discussions extended to admiralty and criminal law, and all classes of questions of private right and procedure, both at common law and in equity. The field of his discussions was broader than that which had been occupied by the jurisdiction of any tribunal preceding the establishment of the Supreme Court. As Lord Mansfield developed the commercial law of England, and Lord Stowell the admiralty, and Lords Nottingham and Hardwicke England's system of equity jurisprudence, so Marshall peculiarly attached his name to the principles of constitutional law.

When he undertook the voyage with our ship of state, he sailed upon undiscovered waters with the language of the Constitution as his only guide. The boundaries of the sea upon which he was embarked, as well as its rocks and reefs, and the nature and localities of the storms which raged upon its surface, were unknown. When his labors were done, he had distinctly marked for the voyagers of succeeding generations all its coasts and headlines; scat-

tered buoys and beacon lights over its bosom, as a certain guide in the most tempestuous times.

Within a few weeks the future course of the ship of state has been debated before the Supreme Court in causes of constitutional importance,<sup>1</sup> possibly not excelled since the end of Chief Justice Marshall's term. The Chief Justice and eight Justices are now the center of interest of the American people. Those nine men, weighted down with the great responsibility of the issue, are casting about in all directions powerful search-lights of historical inquest and power of analysis, endeavoring to seize firmly and securely upon proper guides for a future voyage, freighted with the lives, property and welfare of eighty millions of people.

Marshall, no doubt, was much instructed by the writings of Hamilton and Madison, the prior Chief Justices Jay and Ellsworth; by the unsurpassed judicial learning of Story, twenty-four years his associate upon the Bench; by his associates Bushrod Washington, Johnson, Paterson, Cushing and Thompson; by the men sitting in the various State Judiciaries, such as Shaw, Wythe, Gibson and Kent; by members of a Bar of wonderful brilliancy, such as Sergeant, Lee, Binney, Webster, Clay, Dexter, Hopkinson, Martin and others; by an exceedingly able array of Attorneys-General, Levi Lincoln, who declined a Justiceship in the Supreme Court, Caesar A. Rodney, William Wirt, who served three terms in succession, and was Rufus Choate's law preceptor, William Pinkney, who served two terms, Roger Brooke Taney, and Benjamin F. Butler, who also served two terms.

The attorneys arguing those great constitutional causes raised the profession to its highest plane, and magnified the great offices and functions of the Bar in a manner

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<sup>1</sup> The Insular Cases.

highly gratifying to all its members. A brief illustration of the elevated thought of those lawyers in their discussions before the Supreme Court is afforded by the remarks of Pinkney while arguing the great cause of *M'Culloch* against the State of Maryland: "I have a deep and awful conviction that upon this judgment it will depend mainly whether the Constitution under which we live and prosper is to be considered like its precursor, a mere phantom of political power to deceive and mock us, . . . or whether it is to be viewed as a competent guardian of all that is dear to us as a nation."

Webster was a close student of all Marshall's judgments, and from them, largely, constructed his memorable speeches delivered in the Halls of Congress, in his great parliamentary debates with Hayne and Calhoun. He clothed Marshall's massive arguments in the garb of eloquence and oratory, and fitted them for popular comprehension. He condensed all of Marshall's constitutional judgments into that brief, beautiful, patriotic sentiment: "Liberty and union, now and forever, one and inseparable."

Time will not permit a general discussion of Marshall's characteristics. The closeness of his reasoning and brevity of his language gave energy and power to his writings. Wirt said that power was the secret of his style. An attempt to abstract one of his opinions is necessary to full appreciation of his skill. It is possible to abstract from some judicial opinions paragraphs for every word which can be taken from Marshall's decisions without impairing the sense.

Story said: "There was in him a rare combination of virtues, such only as belongs to a character of consummate wisdom, . . . so rare that I have never known any man whom I should pronounce more perfect. He had

a deep sense of moral and religious obligation, . . .  
a love of truth . . . unflinching, . . . a sincerity  
of thought, . . . gentle demeanor . . . most per-  
suasive in its appeals to the understanding. . . .

“He held the female sex in high value, as the friends, the companions and the equals of man: . . . He was above the commonplace flatteries. . . . He spoke to the sex, when present, as he spoke of them when absent, in language of just appeal to their understandings, their tastes and their duties. He paid a voluntary homage to their genius and to the beautiful productions of it which now adorn almost every branch of literature and learning. He read those productions with a glowing gratitude, . . . proudly proclaimed their merits, and vindicated on all occasions their claims to the highest distinction. . . . But, above all, he delighted to dwell on the admirable adaptation of their minds, and sensibilities, and affections to the exalted duties assigned to them by Providence. Their superior purity, their singleness of heart, their exquisite perception of moral and religious sentiment, their maternal devotedness, their uncomplaining sacrifices, their fearlessness in duty, their buoyancy in hope, their courage in despair, their love, which triumphs most when most pressed by dangers and difficulties; which watches the couch of sickness, and smoothes the bed of death, and smiles even in the agonies of its own sufferings: — these, these were the favorite topics of his confidential conversation, and on these he expatiated with an enthusiasm which showed them to be present in his daily meditations.”

In 1829, six years before his death, it was his privilege to take part in the Convention of the State of Virginia, while Chief Justice of the United States, in forming a

new Constitution for Virginia. In this Convention were James Monroe and James Madison, each twice President of the United States. Madison and Marshall conducted Monroe to the chair, to preside over the deliberations of the Convention. A more imposing spectacle is not easy to conceive than those venerable men of long, varied and distinguished public service, giving the benefit of their counsel to the State of their birth. During the sessions of this Convention Marshall spoke with zeal and great earnestness, urging that the new Constitution should provide that the tenure of the Justices of the Superior Courts should be during good behavior. I cannot conceive of any remarks by which I can close this address of more interest than those of Marshall on that subject:

“The argument of the gentlemen . . . goes to prove, not only that there is no such thing as judicial independence, but that there ought to be no such thing. . . . I have grown old in the opinion that there is nothing more dear to Virginia, and that the best interests of our country are secured by it. Advert, sir, to the duties of a judge. . . . Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience? . . . I have always thought from my earliest youth until now that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary.”



## STATE OF MONTANA.

The State Bar Association of Montana commemorated Marshall Day by holding a banquet at the Helena Hotel, Helena, T. O. Leary, President of the association, presiding. The principal address was delivered by the Hon. Charles R. Leonard of Butte. Responses to appropriate sentiments were made by Hiram Knowles, Chief Justice Brantley, P. J. Walsh, Joseph M. Dixon, Ella Knowles Haskell, A. J. Galen and James Donovan.

### Address of Charles R. Leonard.

I purpose to-night to review briefly some of the principal events in the life and character of that eminent Chief Justice of the United States whose thirty-four years during which he wore the judicial robes are the pride and glory of our republic — John Marshall. His career is an interesting one. While his great renown is connected principally with the Chief Justiceship, yet he would have been a very remarkable man had he never worn the ermine.

Born in 1755 in Virginia, the son of a Virginian planter, he did not have the highest school advantages, and yet he was able to acquire a fair education, including some study of the classics. He was sent away at fourteen to a Latin school, where he remained for two years and where one of his classmates was James Monroe. At eighteen he began the study of the law, which was interrupted by the Revolutionary war.

[Here follows an outline of Marshall's life and public services prior to his appointment as Chief Justice.]

In 1800 President Adams made him Secretary of State. The changes in the politics of Virginia made it a moral certainty that a staunch Federalist like Marshall could look for no preferment, and Adams determined to see to it that the services of his distinguished friend should not be lost to the country. Jefferson was always far from friendly to Marshall, and it probably did not please him to have Adams, just before Jefferson assumed his duties as President, appoint Marshall Chief Justice of the United States, which was done January 31, 1801. The appointment was generally received with favor, for Marshall's ability had long been recognized and the purity of his character had won for him the respect of the entire nation. Marshall was at this time forty-five years of age. His life had been so crowded with honors and his services and employments had been so varied and distinguished that one might naturally think that he had accomplished all that could fall to the lot of one man. But his true career—that which made him great, and for which his memory will be most cherished—was just beginning. His life as a soldier, legislator, diplomat, lawyer and statesman would never have been forgotten, but it was his work as a jurist that made him illustrious.

At the time of his elevation he was described as "in person tall, meagre, emaciated; his muscles relaxed and his joints so loosely connected as not only to disqualify him apparently for any vigorous exertion of body, but to destroy everything like harmony in his air and movements. Indeed in his whole appearance and demeanor—dress, attitudes, gesture, sitting, standing or walking—he is as far removed from the idolized graces of Lord Chesterfield as any other gentleman on earth. His head and face are small in proportion to his height; his complexion

swarthy; the muscles of his face being relaxed, make him to appear to be fifty years of age, nor can he be much younger. His countenance has a faithful expression of great good humor and hilarity; while his black eyes, that unerring index, possess an irradiating spirit which proclaims the imperial powers of the mind that sits enthroned within."

Webster said: "I have never seen a man of whose intellect I had a higher opinion."

Flanders in his *Life of Marshall* thus spoke of him: "He combined in a remarkable degree the qualities that constitute a great magistrate; a mind which no sophistry or subtlety could mislead; a firmness that nothing could shake, untiring patience and spotless integrity. In legal acquirements, indeed, he has been surpassed by others. He was more familiar with principles than with cases, and more knowing than learned."

Story said of him: "It was matter of surprise to see how easily he grasped the leading principles of a case and cleared it of all its accidental incumbrances; how readily he evolved the true points of the controversy even when it was manifest that he never before had caught even a glimpse of the learning upon which it depended. . . . He was solicitous to hear arguments and not to decide causes without them, and no judge ever profited more by them. No matter whether the subject was new or old; familiar to his thoughts or remote from them; buried under a mass of obsolete learning or developed for the first time yesterday,—whatever was its nature, he courted argument, nay, he demanded it."

Binney paid him this tribute: "Whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that noth-

ing that ought to affect the cause was lost by inattention or indifference.” There are many judges outside of the State of Montana of whom this could not truthfully be said.

These qualities of Marshall were devoted principally to the greatest of objects and the one of prime importance to the country, the interpretation of the Constitution of the United States. In this great task he was almost entirely without judicial guide or precedent. In one sense he made the Constitution. For this work, his experience and his associations with the great men who projected this government peculiarly fitted him. He knew the reasons which prompted the formation of a National Government with ample powers to support and defend itself and to assume a proud position among the nations of the earth. ~

The old union of the States was weak and helpless and lacked all elements of nationality. It had no President and its Congress was powerless. Taxes could not be levied, laws could not be enforced, soldiers could not be drafted. The States, through frequent quarrels arising through imposition of taxes on each other's products, disputed boundary lines and other matters, were drifting farther and farther apart and assuming hostile relations.

An efficient central government with a recognized head was what was needed and what was contemplated by the Constitution. Marshall's interpretation of it left no doubt of that fact.

Marshall in numerous decisions clearly defined the powers of the different departments of the Government, and illustrated how each acted as a check upon the other. He must have startled some of the adherents of the States' Rights belief when he declared void various acts

of State legislatures. The power of the Supreme Court was fully exemplified when acts of Congress were adjudged unconstitutional. It would be impossible within brief limits to review the great number of decisions, covering many branches of constitutional law, which were given by Marshall during the thirty-four years of his Chief Justiceship. Suffice it to say that during that period the powers of Government in its various branches, as they are understood and accepted to-day, were clearly defined by him.

The magnitude of the work can be in part understood when it is remembered that no legal precedents were before him, and in his interpretation of the Constitution he had to gather its meaning from its terms and the spirit of its makers, which was so well known to him. His faculty for reasoning was great, and his power of applying the fundamental principles of law to new and difficult questions has never been equaled.

The Supreme Court, during his incumbency, was also called on to decide perplexing questions growing out of treaty rights, our relations with the Indians, the law of prize, and general maritime jurisdiction. To all of these questions Marshall devoted the same intelligent study and care and with results gratifying to the entire country.

Marshall was respected and beloved by the bar and the country for his gentleness, his integrity and his commanding ability. In any consideration of Marshall's work we cannot lose sight of the brilliant members of the bar who must have greatly assisted him in his construction of the Constitution. There were Webster, Pinkney, Wirt, Binney, Clay, Dexter, Story, and a throng of others whose names are familiar to every student of the law. They form an illus-



trious background in the picture of the great Chief Justice. Their labors must have been a valuable factor in the results accomplished by the court, and Marshall always gave them ample credit.

Marshall's incumbency of office covered the administrations of Jefferson, Madison, Monroe, John Quincy Adams and half of the second term of Andrew Jackson. In fact it coincided with what might be termed the principal part of the formative period of this government, which under the Constitution as Marshall expounded it has grown into the noblest, truest, freest Republic on the face of the globe. Marshall is one of those characters who, like Washington, seem to have been providentially raised up for a work which called for so much talent and true greatness, and which was to affect the welfare of coming millions.

The proud heritage of this Republic is the long list of patriots, statesmen and jurists who builded and launched and guided our ship of state through unknown seas and amid unknown dangers. In this Marshall was the great pilot. He sat calmly at the helm. He definitely fixed our national latitude and longitude. He scoffed at the fears of the faint-hearted; he inspired with courage those who despaired of our future; he skilfully avoided the breakers, and with an unerring faith and judgment born of Heaven itself he brought us into the harbor of national security and honor.

## STATE OF OREGON.

On the 4th day of February, 1901, on the opening of the United States District and Circuit Courts at Portland, Oregon, Judge Charles B. Bellinger presided, and by invitation four judges of the State Circuit Court occupied the bench with him, namely: Judges Arthur L. Frazer, John B. Cleland, Alfred F. Sears, Jr., and M. C. George. A large number of members of the bar was in attendance.

Fitting resolutions were presented in behalf of the bar and were ordered to be entered of record.

The following members of the bar addressed the court upon subjects previously assigned to them: "The Times of Marshall," C. E. S. Wood; "Osborn *v.* Bank of the United States," John B. Cleland; "Gibbons *v.* Ogden," Zera Snow; "The Trial of Aaron Burr," W. D. Fenton; "The Dartmouth College Case," A. F. Sears, Jr.; "The Marbury Case," Charles B. Bellinger.

At the conclusion of these proceedings the court adjourned for the day.

At a subsequent hour the State Circuit Courts also directed the entry of appropriate resolutions in their journals.

At 2 o'clock P. M., a large number of the bench and bar and the public assembled at Cordray's Theater, Portland, on which occasion Mr. Horace G. Platt, of San Francisco, was introduced by Judge Bellinger, and he then delivered the oration printed below.

At Salem, the capital of the State, appropriate ceremonies were had before the State Circuit Court in the morning, and at 7:30 P. M., at the request of the Legislative Assembly, the Governor and the Justices of the Supreme Court, Mr. George H. Williams, some time the Attorney-General of the United States, delivered an oration in the Hall of Representatives before the State officers and members of the Legislature and a representative gathering of citizens.

By proclamation the Governor set aside the afternoon of the day as a public holiday, and throughout the State the day was observed with suitable ceremonies. The schools and colleges closed, after appropriate proceedings, including lectures and addresses commemorating the life and work of Chief Justice Marshall.

#### **Address of George H. Williams.**

Daniel Webster, in one of his great speeches, said: "By ascending to an association with our ancestors, by contemplating their example and studying their character, by partaking their sentiments and imbibing their spirits, by accompanying them in their toils, by sympathizing in their sufferings and rejoicing in their successes and triumphs, we mingle our existence with theirs and seem to belong to their age." To-day we commemorate the appointment one hundred years ago of John Marshall as Chief Justice of the Supreme Court of the United States, and ascend with hearts full of pride and gratitude to an association with the men and events of that day. Washington, Madison, Hamilton, Jefferson and many others not less worthy were working out the problem of self-government, but in this constellation of patriots and statesmen none shine with a clearer, steadier and stronger

light than John Marshall. Washington deservedly and by universal consent holds the first place in the hearts of his countrymen, but if merit is to be determined by the value of his services, then next to Washington among Virginians John Marshall "leads all the rest."

To say this is not to disparage the great abilities or merits of Madison, Jefferson or others, but to say that Marshall had greater opportunity than his compeers to render valuable services to his country. And I may add that Jefferson and Madison made some serious mistakes as to matters of government, but none of any consequence was ever made by Marshall. Jefferson devoted his great talents and influence to the cause of his country in the War of the Revolution, but, when the independence of the colonies was achieved, he differed with Washington, Hamilton, Jay and others as to the nature of the General Government and the rights of the States, and his resolutions of 1798, incubated by slavery, finally broke out into a bloody war for the dissolution of the Union. Madison was infected with the same ideas, as indicated in his Virginian resolutions of 1799, but in his old age he became more conservative and more favorable to the supremacy of the Federal Government.

Marshall, from the beginning of his public career to the end of his life, builded, supported and defended an indestructible Union under a Government within its constitutional limits of absolute sovereignty over the States. Washington, Hamilton and Adams, with their followers, called "the Federal party," favored a broad and liberal construction of the Constitution adequate to the growing necessities of the country. Jefferson, Madison and their followers, called "the Anti-Federalists," held to a strict and narrow construction of the Constitution. Though the

Federal party, on account of its views of the Constitution, went down, the drift of all political parties of the present day is in favor of the Federal theory of government. I can remember the time when the dominant party of the country held that appropriations by Congress for a system of internal improvements were unconstitutional, but now all parties hold otherwise, and the statesmanship of a Senator or Representative in Congress is measured by the amount of money he can secure from the public treasury to improve the locality in which he lives. One of the main issues in the late Presidential election was as to which party had gone, or would go farthest, through Congressional legislation, to regulate and control the business affairs of the country, which formerly were supposed to belong exclusively to the States. One of the mischievous tendencies of the time, in my judgment, is to make the General Government too much the guardian and benefactor of individual and local interests.

Great men are born and not made by education or opportunity, but opportunity is as necessary to the display of greatness as sunshine is to the growth of vegetation. No doubt multitudes of men as great as any named in history have lived and died in obscurity for the want of an opportunity to exploit their greatness. Washington, without the Revolution, might have continued a respectable planter of Virginia. Lincoln, without the slavery agitation, might have continued a lawyer of local fame in Illinois, and Grant might have remained a humble tanner at Galena, without the War of the Rebellion. But great men come with great opportunities, and the world resounds with their fame. Marshall was a great man, and he had greater opportunities than his contem-



poraries to show his greatness. He was appointed Chief Justice in 1801, when our government was in a chrysalis state; and long after Washington, Adams, Jefferson, Madison and Hamilton had retired to private life, he was placing pillars of strength and stability under the Constitution of the United States.

On the 24th of September, 1755, just as the sheen of summer was passing into the gold and russet of autumn, a man child was born in Fauquier county, in the Colony of Virginia. He was named John Marshall. Virginia was then a new country, sparsely settled with white people, and most of her mountains, streams and forests had never been disturbed by the hand of civilization. Nature in her primordial freshness and beauty was the primary department in the education of Marshall. Like Washington and Lincoln, he was a scholar without the benefit of schools. Parental instruction and his own resources were his sole dependence in his early boyhood. To acquire learning under such circumstances is to learn to be industrious, courageous and self-reliant. Men who are educated in this way are apt to make their mark in the world. Ambition with native vigor of intellect is the key to success, and it makes little difference in the end to a Lincoln whether he goes through college or reads his books in a log cabin by the light of a blazing pine knot. One of the surprising things about Marshall was his literary and professional attainments, in view of his limited opportunities for an early education. His parents were his only teachers until he was fourteen years of age. When he had learned to read, Shakespeare, Milton and Pope were about the only books to which he had access. To study books like these, away from the allurements of social life, and where unsullied nature "glows in the stars

and blossoms in the trees," opens the youthful mind to grand conceptions of a future career. Between the age of fourteen and eighteen years he was favored with instruction by a private tutor, and with qualifications acquired in this way he determined to enter upon the practice of the law. He commenced to read Blackstone, but the premonitory convulsion of the approaching Revolution drew him away from his books to a field of excitement, turmoil and danger. . . .

Marshall was forty-six years of age when he was appointed Chief Justice. Several pen pictures were written of him at the time. One writer describes him as a person tall, meager, emaciated, his muscles relaxed, his joints so loosely connected as not only to disqualify him apparently for any vigorous exertion of body, but to destroy everything like harmony in his air and movements. Another said of him: "He is of a tall, slender frame, not graceful or impressing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low, but his features are in general harmonious. His manners are plain, yet dignified, and an unaffected modesty diffuses itself through all his actions." Daniel Webster spoke of him as a plain man, and further said: "I have never seen a man of whose intellect I had a higher opinion." According to these descriptions I have been struck with the resemblance between Marshall and his eminent successor, Chief Justice Taney, whom I had the pleasure of meeting in 1852. Taney was tall, thin and meager in person, with a remarkably low forehead, black, piercing eyes, and sharp, strong features; but he was the impersonation of dignity and a typical specimen of an old-fashioned courtly gentleman. Taney's opinion in the Dred Scott case will compare favorably with the

opinions of Marshall as an intellectual effort, but the difference is this: Taney's opinion is an ingenious framework of logic, standing, or trying to stand, upon its apex, while the opinions of Marshall are solid structures of reasoning, standing upon a broad, deep and permanent foundation.

On the 26th of September, 1789, the Supreme Court was organized, with John Jay as Chief Justice. He held the office until 1795. Rutledge held the office for one year, and then Ellsworth until 1801; so that when Marshall was appointed the court had been in existence about eleven years and was just upon the threshold of its great responsibilities. We can have but a feeble conception of the difficulties confronting this new forum of law and justice. Here was a court without any precedent in history, with powers never before conferred on any judicial tribunal, starting out on a career very much like the experiment of Columbus in sailing out upon an unknown ocean, without knowing what he would discover or where he would land, or whether or not his voyage would be a disastrous failure. Many, perhaps a majority, of the people of that time looked upon this court as a disguised enemy to the liberties of the people. Its most sanguine friends had doubts and fears as to its harmonious working with the other departments of the Government. While it may be true, as Gladstone said, that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man," it is also true that without a tribunal of final resort to interpret, construe and enforce its provisions, if not a dead letter, it would be the subject of unhappy and endless disputation.

Primarily, and as applicable to all its parts, was the

great question whether or not it should be strictly or liberally construed; or, in other words, whether it should be construed according to the letter that killeth or the spirit that giveth life. All those opposed to the adoption of the Constitution, and the Republicans, as the anti-Federalists were then called, with Jefferson at their head, contended for a strictly literal construction, because they were jealous of the jurisdiction of the Federal Government and sensitive to the rights of the States; but Marshall, with the wisdom of a seer and the prevision of a prophet, was of a contrary opinion. Referring to this subject in the case of *Gibbons v. Ogden*, he said: "If counsel contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the Government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the Government and render it unequal to the objects for which it is declared to be instituted and to which the powers given as fairly understood render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded."

Taking all his opinions together, his idea of the Constitution seems to have been that, expressly or by implication, it granted to the General Government all the necessary and proper means to establish justice, insure domestic tranquillity and promote the general welfare, and that these means were largely discretionary; but at the same time he recognized the doctrine that the General Government was one of delegated and limited powers. It is easy to see that to draw the line of de-

markation between what was granted and what was withheld by the Constitution required great good judgment, and a comprehensive view of the objects and purposes of the Government. One of the important questions arising at an early day was whether or not the Supreme Court had a right to declare an act of Congress void upon the ground that it was repugnant to the Constitution. This question was decided by Chief Justice Marshall, delivering the opinion of the court in the celebrated case of *Marbury v. Madison*, in which it was held that an act of Congress conferring original jurisdiction upon the Supreme Court in a *mandamus* case was unconstitutional and void. Some politicians have complained of this decision, but its correctness cannot be successfully challenged.

No decision of Marshall's has been more severely criticised than his decision in the *Dartmouth College* case. The court held in that case that a charter granted to the college was a contract, and that an act of the legislature of New Hampshire changing it was void, under that clause of the Constitution providing that no State shall pass any law impairing the obligation of contracts. Much has been said about the protection this decision gives to corporations, but be that as it may, it stands like a gleaming rock to support the supremacy of the Constitution and the inviolability of contracts. Marshall delivered the opinion of the court in *Fletcher v. Peck*, in which it was held that a grant of land by the State of Georgia was an executed contract and that an act of its legislature revoking the grant was unconstitutional and void. In the case of *M'Culloch v. Maryland* he defined the words "necessary and proper" in that clause of the Constitution providing that Congress shall



have power to make all laws necessary and proper to carry into execution the powers granted, giving to them a broad and liberal import, so that the General Government might provide for the varying exigencies of its administration. In the case of *Gibbons v. Ogden* he decided, delivering the opinion of the court, that Congress had the right to exercise exclusive jurisdiction over the navigation of the navigable waters of the United States. I have referred to these decisions, not so much to discuss or defend them as to show that John Marshall was a firm and consistent protector and defender of the Constitution and of a strong, efficient and successful General Government.

Suppose, instead of Jay, Marshall, Ellsworth and their associates, the judges had been of those who held with the Kentucky resolutions of 1798 to the effect that a sovereign State had a right to nullify the acts of Congress, there is reason to apprehend that the Union would have fallen to pieces at the start, and rebellion would have triumphed through the Supreme Court. Suppose instead of Lincoln, when the rebellion broke out, the President had been of those who held that the General Government had no power to coerce a sovereign State, it is highly probable that instead of the joyousness of this day we should be sorrowing over the "broken and dishonored fragments of a once glorious Union." I do not know whether the "Father of Mercies" interferes in a special manner for the protection of men and nations or not, but when I consider how near our Union has been to destruction and how wonderfully we have been preserved as a Nation, I am sure that faith can find nowhere better evidence of the special favor of Divine Providence to a people than in the history of our country for the last hundred years.

An interesting episode in the life of Marshall was the trial of Aaron Burr. Burr, in respect to his abilities, stood in the front rank of the men of his day, but if what is said of him is true, he was much like Milton's Belial:

"He seemed  
For dignity composed and high exploit.  
But all was false and hollow."

He was indicted for treason, and his trial came on at the Richmond circuit, Chief Justice Marshall presiding. No man ever in the United States, with perhaps the exception of Benedict Arnold, was so intensely hated as Burr was at this time. He had killed Hamilton in a duel and betrayed and abused the confidence of Jefferson and his friends. All the influence of the administration, with Jefferson as President, was thrown in favor of the prosecution, and there was a hurricane of popular clamor for his conviction, notwithstanding which Marshall decided that the evidence was insufficient to support the indictment, and Burr was acquitted. Shafts of indignation, envenomed by party rancor, were hurled at the head of the Chief Justice for this decision, but to no purpose.

"No fire, nor foe, nor fate, nor night,  
This Trojan hero did affright."

Music and banners, the shouting of captains and the surrounding excitement inspire soldiers on the field of battle to deeds of daring, but the real heroes of the world are men who, with nothing to encourage them but their own convictions of duty, stand like a stone wall between the friendless and forsaken and the fury of the mad and unreasoning multitude.

I am proud and happy to say, after more than fifty years of experience at the bar, that with few exceptions our judges have been men of this description.

I am aware that we are apt to exaggerate the wisdom and virtues of our ancestors, but there can be no doubt that the men who argued cases before Marshall were among the greatest, if not the greatest, lawyers this country has produced. Webster, Pinkney, Hopkinson, Martin, Ogden and Wirt were some of the leading members of the bar who practiced in the Supreme Court. Let us imagine ourselves in the court room when the case of *M'Culloch v. Maryland* is before the court. Sitting on the right of the Chief Justice are Bushrod Washington, Johnson and Livingston, and on his left Duvall and Story. All are clad in black silk robes. No sound disturbs the impressive silence. All eyes are fixed upon and all ears open to hear the great lawyers. Webster, Wirt and Pinkney are on one side, and Martin, Hopkinson and Jones on the other. The question is, whether Maryland has a right to tax a branch of the United States Bank located in that State. Webster opens for the bank. Slowly and clearly he states the issues of the case, and then, as he proceeds to expound the Constitution, he becomes more animated. His swarthy complexion lightens up, his big, black eyes glow in their deep sockets, and with argument dovetailed into argument he seems to build an impregnable fortress around his client. Attorney-General Wirt follows on the same side with a speech interesting and attractive for its rhetorical excellence. Hopkinson and Jones, both eminent in their profession, each makes an able argument for the State, and then comes Luther Martin, who stands at the head of the Maryland Bar. He denounces the encroachments of the Federal Government, and pleads with all the earnestness of his ardent nature and all the force of his great abilities for the rights of his native State. Expectation is

now on tiptoe to hear the eloquent Pinkney. He rises with an air of perfect confidence. He attacks the States' Rights doctrine with tremendous energy. He makes the corridors of the court room echo with his resonant voice. All are charmed with the forcefulness of his logic and the splendor of his language. Judge Story said of this effort by Pinkney that he had never heard a greater speech in his life. The court held unanimously that the bank was a proper fiscal agent of the Government and its operations not subject to the taxing powers of a State.

Marshall's opinions are quite elaborate, but they contain no pedantic display of learning or useless glitter of words, but move on in simplicity and strength like the current of a deep river to their irrefragable conclusions.

I can judge of the merits of Marshall as a public man by his official acts and opinions, but I have to depend upon his biographers for any account of his private life. According to these he was attentive, patient and courteous upon the bench, amiable and affable in society, simple and unpretentious in his manners, and exemplary in his habits. His home, when he was not occupied with the courts, was a plain house, where he was accustomed to lay aside his judicial dignity and pitch quoits with his friends, an amusement in which he delighted and in which he excelled. He was a loving and lovely man in his family, and when his wife died, with whom he had lived happily for forty-eight years, he was overwhelmed with grief, and would not be comforted. I hold that the true value of a man is determined by his family and social relations. Men in public life intent upon notoriety may be heartless and unscrupulous, and under false colors win favor and applause, but in the home and at the fireside no such disguise can be assumed, and the man really is what

he appears to be. The hearthstone is the touchstone of real worth.

Most men in the religious, professional and political world have an ideal — an embodiment of what they would like to be. Though without doubt Marshall had passions and feelings like other men, I have discovered no serious flaw in his character, and know of no reason why he should not stand as an ideal for the legal profession. All lawyers cannot be as great as Marshall was, but all lawyers can be as great as he was in all that constitutes the beauty of a character. Marshall was an author as well as a soldier, statesman and jurist, and wrote an exhaustive and accurate life of Washington. He was also a member of the Constitutional Convention of Virginia in 1829 when he was seventy-four years old, and was treated by that body with all the veneration and respect due to his great age and experience.

I was admitted to practice in the Supreme Court of the United States thirty-five years ago and have learned to look upon that court as a great tribunal, the greatest in the world. Forty-five States, with 76,000,000 people, submit to its jurisdiction and abide by its decisions, and upon this fact we may anchor our hopes for the future preservation and domestic peace of the American Union. Constitutions and creeds, churches and courts, are more or less responsive to public opinion, but the Supreme Court of the United States is as far removed from the influence of passion and prejudice as it is possible for a human tribunal to be. Sitting in the Capitol, midway between the two Houses of Congress and independent of both, this exalted and serene tribunal holds the balances of the government with a firm and equal hand.

Anniversaries like these are instructive and salutary



and appeal to us from the sacred precincts of the tomb to avoid the mistakes and emulate the virtues of the great and good men who have adorned our history. John Marshall, at the ripe old age of eighty, and after he had been Chief Justice thirty-four years, to borrow from the liturgy of the Episcopal Church in which he worshipped, was "gathered unto his fathers, having the testimony of a good conscience; in the communion of the catholic Church; in the confidence of a certain faith; in the comfort of a reasonable religious, and holy hope; in favor with God, and in perfect charity with the world."

**Address by Horace G. Platt at Portland.**

The evil that men do is said to live after them, but the good is oft interred with their bones. There are, however, good men as well as bad men, who "departing leave behind them footprints on the sands of time," whose good work knows neither death nor dying, but lives on through the centuries. To the memory of such a man, Chief Justice Marshall, the bench and bar of this country are assembled to do honor and reverence on this the one hundredth anniversary of his elevation to the Supreme Bench.

The close of a century is suggestive of retrospection, and invites us to revisit its dawning, as does the beginning of a century hurry us on the wings of anticipation to its close.

The nineteenth century and the Republic were rocked in the same cradle. The two have grown up together, foster brothers, as it were, and they challenge comparison one with the other. The century began its travels on a stage-coach; it ends them on limited trains that keep company with the sun as they speed across the con-

tinents. It began its correspondence with letters that lagged behind the snail; it ends it with the telephone and telegraph, that pace the lightning. It began with the nations whole wide worlds apart; it ends with earth's remotest regions in neighborly communication, and all the world a whispering gallery. It began with little science, less machinery and no surcease from pain; it ends with science dropping in ripe fruit from the tree of knowledge, machinery a wizard doing the work of magic, and pain lulled to sleep by the hypnotism of anesthetics.

Equally marvelous has been the development of this Republic, of its government, its resources and its people.

One hundred years ago thirteen sparsely settled States fringing the Atlantic constituted the United States of America. Its western boundary was the Mississippi, but its southern line did not extend to the Gulf of Mexico. To-day the United States of America consists of forty-five States and four Territories, cemented by blood into a Union one and indivisible, containing a population of eighty millions, and extending from British Columbia to the Gulf of Mexico, from the Atlantic to the Pacific, and including in addition the arctic region of Alaska, the Hawaiian Islands, the Antilles and the Philippines, those tropic isles of the Eastern and Western Seas, in all a great empire, second to none beneath the stars.

One hundred years ago we had a government that was an experiment, based upon a written Constitution not yet understood or interpreted. To-day we have a government that has stood all the tests a hundred years could devise, a government proven to be of the people, by the people, and for the people, to be a tower of strength for struggling humanity, from whose summit the torch of liberty lights the world; and it is based upon this same

written Constitution to which John Marshall gave its original interpretation, an interpretation that time has strengthened and circumstances affirmed, an interpretation that is as permanent as the Constitution, an interpretation that was a masterly unfolding of the meaning of the Constitution, that "found it paper and made it power," and to which we are indebted for the present strength and stability of this government, the present National oneness of this heterogeneous collection of State sovereignties, and the consequent supremacy on the American Continent of the United States. Therefore to this great jurist more than to any other man since Washington do we stand indebted for the greatness and the glory that characterize the United States as the crowning achievement of the nineteenth century.

There is no page in our country's history that the life of this great jurist would not adorn. There is no one of our country's builders who can claim more renown. It therefore becomes us, and must interest and instruct us, to review the events of his historic life, to recall his virtues, recount his achievements, and renew the immortelles upon his grave. I therefore ask your attention while I briefly and reverently attempt his eulogy.

While he was a member of the House of Representatives Adams offered him a Supreme Court judgeship, which he declined, and then appointed him successively Secretary of War and Secretary of State. The latter office he filled until January 31, 1801, when he was appointed Chief Justice, taking his seat on February 4th of the same year.

He was then forty-six years of age. What a contrast his career then beginning was to be to that of his great French contemporary, Napoleon Bonaparte, who, a few years later, when also forty-six years of age, finished a

career that like a meteor had dazzled the world both by the empyrean height its starry course pursued and by the brilliancy of its light that destroyed all it illumined!

One hundred years ago these two men were leaders of the two peoples that were then attracting the attention of the world by their struggles for the rights of man. One sought his own glory, the other only the people's good. One fell from the throne he had erected upon the liberty of his country at the age when the other took his seat as Chief Justice of the highest court of his land, where for over a third of a century he guarded the people's government from the assaults of its enemies. When the recording angel shall call the roll of the great men of the ages, those men whose minds shone with the light of genius and whose lives glowed with the Promethean fire, not to the one who sought to scale the stars upon a pyramid of crushed humanity, but to the one who helped humanity itself to reach the stars will come the glad tidings, "Well done, good and faithful servant, enter thou into the joy of thy Lord."

When Marshall became Chief Justice practically nothing had been done by the courts in construing the Constitution. There had been but few decisions by the Supreme Court upon constitutional questions. During his incumbency of thirty-four years there were fifty-one such decisions rendered by this court, in thirty-four of which he wrote the opinions, and in all but one of which his was the controlling mind. In but one of these he was overruled, the case of *Ogden v. Saunders*, wherein he wrote a dissenting opinion against the power of the States to pass bankruptcy laws.

The originality of his decisions may be best understood by bearing in mind that a written Constitution, created

by the people and capable of being altered or repealed only by the people, controlling and not controlled by the Legislature, was at that time a new thing in the science of government. The Bench and Bar of that day had known only the English Constitution, which Parliament could change at will. They were now called upon to construe a written Constitution, from which the executive, legislative and judiciary departments alike derive their powers, and which measured out as it created all their authority. This charter was like an unexplored country, unmapped, unsurveyed, undeveloped.

The prevailing tendency of that revolutionary period was to make the legislative department supreme. The opposing tendency, as voiced by such creative men as Hamilton, was to strengthen the executive department against the encroachments of the legislature. Such a situation was, in the language of Senator Daniel, of Virginia, without a precedent in history, and has no parallel. The occasion demanded a judge who could, without fear and without reproach, construe this instrument, blaze out the paths each department must tread, and measure out the power each may exercise. This judge had no precedents to follow. His only guide was the letter of the law, his only inspiration its spirit, his only resource great wisdom unclouded by passion or prejudice.

Marshall was such a man. He did not need precedents. His mind seemed sufficient unto itself. The meaning lay to him in things themselves, and not in what others said about them. Therefore his opinions are almost free from the citation of authorities, from quotations or illustrations. As the artist can see the perfect image within the block of unhewn marble, so Marshall could see the meaning of the Constitution in the unexplained writing.



Said Justice Story: "When I examine a question, I go from headland to headland, from case to case; Marshall had a compass, put to sea, and went directly to his result." He excelled in the power of stating a case so clearly that his statements were arguments. He possessed a marvelous grasp of principle, a power of logical reasoning that amounted to mathematical demonstration, a miraculous insight that went straight to the ultimate fact, and a courage that allowed no interference with the pursuit of truth. In his development of the law as he understood it, and he instinctively knew what the law was, he recognized neither rank nor power, neither rich nor poor, neither favor nor disfavor, neither Republican nor Federalist, and, as has been well said, "he taught angry Presidents and partisan Legislatures to bow to the majesty of the law." Of him the Charleston Bar said: "His fame has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary."

His greatest work was in judicially defining the jurisdiction of the three departments of Government as prescribed in the Constitution. He had mapped out his course in this regard in his arguments in the Legislature, at public meetings and in Congress. Upon the bench he clothed these arguments with judicial authority, and in *Marbury v. Madison* he did this with remarkable force and effect. His opinion in this case may be deemed to be as great a document as the Bill of Rights, as far-reaching as the Declaration of Independence, as essential to the healthy development of our Government under the Constitution as the Constitution itself, as one of the great bulwarks of Government under law against personal or popular government, as a search-light casting its

rays from the Dome of the Temple of Justice upon the Government, and, like the modern X-ray, disclosing the orderly arrangement, the distinct and separate existence and the prescribed duties of all its parts, and the pre-eminence of the Constitution over all. In this opinion Marshall, with infinite tact, but with the clearness of the noonday sun, disclosed not only the path along which Presidential authority may travel without let or hindrance, except that of conscience and its own discretion, but also the path along which the Presidential steps are controlled by law as rigidly as those of the humblest official. In this opinion he revealed to the world how surely and securely the law protects the rights of the citizens. In this opinion he judicially proclaimed the supremacy of law over President, Congress and the Supreme Court. In this opinion there was first announced to the world the doctrine that the judiciary could declare void a law enacted by Congress and approved by the President, if it contravened the Constitution. Without this power in the Supreme Court the Republic must have foundered on the rocks of Executive usurpation or the shoals of Legislative tyranny.

It is impracticable to enumerate the many great constitutional questions that came before him for settlement, and that he settled for all time; but it may be interesting to note a few as illustrative of the importance of his labors in strengthening the government, and in protecting the rights of the individual.

After noticing and commenting on the Dartmouth College Case, *M'Culloch v. Maryland* and *Gibbons v. Ogden*, the orator proceeded:

These questions so decided by Marshall now appear

too simple to be disputed. But this idea arises from the fact that the present generation has grown up to look upon them as self-evident constructions of the Constitution.

In Marshall's day, however, they involved the existence of the Union as a strong, independent, self-protecting, efficient government, and they aroused in their settlement all the learning, eloquence and industry of such lawyers as Wirt, Webster, Pinkney, Luther Martin and others as able.

Marshall, it is true, was a Federalist, but not in the sense that Hamilton was. He was not a liberal constructionist, as was Hamilton, nor was he a strict constructionist, as was Jefferson. He believed that the Constitution must be carefully examined to ascertain if any particular power was therein given, that upon him who asserted the existence of the power rested the burden of proof, but that if such power was established the Constitution gave all those incidental powers which are necessary to its complete and efficient execution.

With great wisdom, with great common sense, he found the constitutional provision that Congress may make all laws which shall be necessary or proper for carrying into execution the powers vested in the Government of the United States, a cornucopia from which could be poured whatever was needed to effectuate a constitutional power. "Let the end be legitimate," said he, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." Thereby he made the Constitution an instrument that did not, like a strait-jacket, dwarf a

growing, enterprising, expanding people, but that has grown with the people, and always along the lines of its original design.

Realizing that the Constitution was the sheet-anchor of the Government, that like the Government it was "framed for ages to come, and was designed to approach immortality as nearly as human institutions can approach it," he based his constructions upon a patriotism so broad, a logic so inexorable, a wisdom so profound, and a pre-science so far-reaching that they remain to-day our mainstay and our guide, as applicable as when rendered, and give promise to our hopes of their anticipated immortality.

We do not say that without Marshall the Union would certainly have been dissolved by the centrifugal forces that fought for what they called the rights of the States, but we do say that Marshall's decisions accomplished the purpose expressed in the opening lines of the Constitution, to wit: "To form a more perfect Union," and that at that formative period of our Government he was equal to his great opportunity to bring about a more perfect union of the States.

"The people made the Constitution, and the people can unmake it," said he. "It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or unmake resides only in the body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it." This doctrine was the centripetal force that welded the many parts called States into the homogeneous whole called the Union; this was the doctrine that made the Federal

Government supreme and independent in all matters delegated to it by the Constitution, without which independence from State interference there could not have been the more perfect Union designed by the fathers.

The especial characteristic of Marshall to which I desire to call attention, apart from his great wisdom, was his great courage. Many judges are learned and able. Most judges are honest. Not so many have the courage of their convictions. Many are intimidated by the necessity of courting popular favor because of their need of popular approval when they seek re-election. Some seek popular approval and mistake the reputation of the moment for the fame that comes hereafter and goes not away.

Marshall was such a man and such a judge.

In the Burr trial there was much to influence a weak judge. Burr's hands were red with the blood of Hamilton, whom Marshall had loved and respected, and whose death he felt was a great loss to the country. The President desired and did all that he decently could to secure a conviction. The people believed Burr guilty and demanded his life. So strong was this feeling on the part both of the Administration and the public, that upon Burr's release the United States Attorney exclaimed: "Marshall has stepped in between Burr and death." The President did not hesitate to intimate that his acquittal was due to Marshall's Federalist inclinations, and the mob burned the Chief Justice in effigy.

But neither the calumnies that the present voiced or that could be expected of the future deterred Marshall from deciding as the law prescribed.

Marshall's conscientious appreciation of judicial duty was nowhere more apparent than in the matter of the



issuing of a subpoena to President Jefferson in the Burr trial. After laying as his foundation the statement that "In the provision of the Constitution and of the statute which give to the accused a right to the compulsory process of the court, there is no exception whatever," he said: "It cannot be denied that to issue a subpoena to a person filling the exalted station of Chief Magistrate is a duty which would be dispensed with much more cheerfully than it would be performed! But if it be a duty the court can have no choice in the case," and he issued the subpoena, adding the statement that "whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it."

"The Judicial Department," said he, near the close of his life, in the Virginia Constitutional Convention, "comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that the judge should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? I have always thought, from my earliest youth until now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary."

In these days when the press can by daily abuse and crimination prevent the re-election of judges whose decisions have been honestly rendered, when aggregated capital or aggregated labor can secure the defeat of a judge who has neither usurped power nor shrunk from his duty, but has simply taken the course marked out by law, it

is small wonder that an elected judiciary is not always independent, without fear and without reproach. To our endless glory and good fortune, Marshall was independent of official favor or popular prejudice or journalistic lampooning. We believe, however, that none of these would have affected his decisions even had Jefferson had the power of removing him, or had the voters had the opportunity of defeating him at the polls.

We believe that during the century just opening, with the fever of concentration burning in the veins of both capital and labor, the former desiring to accumulate dollars and the latter desiring to share them, with the labor trust controlling the votes and the industrial trusts controlling dollars, the need of an independent judiciary will become more and more a pressing necessity. On both sides there is right. On each side there is often wrong. Each should have equal justice. But this even-handed justice must come from an independent judiciary, and this independence can be secured only by a life or a long tenure of office and by ample compensation.

It has been said by an orator, in speaking of Marshall, that the test of greatness is great ability coupled with great opportunity greatly employed. This country will always produce men of great ability, and it will always furnish great opportunities. These to be greatly employed upon the bench must be coupled with great independence.

Marshall as an individual was simple in habits, kind in disposition, dignified in deportment, courteous and considerate towards others, and in thought, in speech and in conduct ever chivalrous towards women. Of his parents he always spoke with great reverence and filial piety, and for his wife he had a love that grew stronger with the years.

The American people will ever associate Marshall with Washington in sacred and grateful memory. He was ever the able and fearless defender of Washington, and as Chief Justice took up the work where the first President laid it down, and carried it on in the spirit of him who began it. It was therefore most fit that he should have been the first chairman of the committee appointed to erect a monument to the Father of his Country. The shaft erected by this committee in its simplicity and height well portrays the character of Washington. But the real monument to both Washington and Marshall, more imperishable than brass or sculptured marble, is this Constitutional Government that has stood the strain of a civil war, the greater strain of accumulated wealth and vast territorial expansion, and which starts the new century with great burdens, new responsibilities, and unlimited temptations, and with the promise of another century's growth along the lines so clearly marked out by John Marshall.

We can well attribute to him the credit of building for all time. Though the number of States has increased from thirteen to forty-five, and our territory has expanded from the Mississippi to the Pacific, and thence northerly to the land that is lit by the Aurora Borealis, and southerly and westerly to the islands of the tropic seas in whose midnight skies glitters resplendent in starry outline God's symbol of hope, the Southern Cross, expansion has not weakened the influence of the Federal Government in the remotest States nor lessened their loyalty to the Union. Though a network of railroads intersects the land in all directions, like living veins pulsating with the hot blood of competition, almost obliterating State lines, and though commercial corporations

and labor unions ramify the country irrespective of political divisions, we are still tenacious of our State sovereignties. Though we have wars beyond the seas and foreign complications are increasing as our foreign trade grows larger, and innumerable new problems in politics and economics are daily arising from our rapid internal and external growth, we are still loyal to our traditions, undismayed by the difficulties of the present, hopeful of the future, and above all still wedded to the Constitution as Marshall construed it, and time but the impression stronger makes as streams their channels deeper wear.

We gratefully appreciate his breathing into this Constitution the breath of a vigorous life, his developing this Constitution along such lines of healthy growth that each member of our Union has been individually stimulated, yet kept in harmony with the others and in subjection to all, whereby there has been produced a Constitutional Government under which any number of States and Territories can live, each in distinct existence, but as a united whole, as diverse as the waves and yet as united as the sea, capable of any expansion, impossible of disruption, powerful because of the individuality of its parts and the solidity of its harmonious whole.

Therefore, to-day, all over this land, in the capital of the Old Dominion where his labors began, at the capital of the nation where his labors ended, in Philadelphia where hangs old Liberty Bell that was rent in tolling his funeral knell, in all the marts of commerce that border the Atlantic, in the cities of the Great Lakes where throbs the nation's heart, along the wide rolling Mississippi hastening to the sea; at the city of the Golden Gate where the occident meets the orient in a sunset greeting, and here in this metropolis of the north, we do reverence to

him as one of the greatest Americans. Therefore, to-day, in every court in the land, lawyers suspend their labors and litigants halt in their contentions, to listen only to the voice of his eulogist, while Justice opens her eyes to behold the glory of her most illustrious ministrant.

Gentlemen of the Bench and Bar, the fame of lawyers, however learned and eloquent they may be, is ephemeral. The reputation of judges is but little less evanescent. Their glory is in laws honestly administered, in justice impartially awarded. To the soldier and to the statesman is it more frequently given to pitch his tent on Fame's eternal camping ground, to be honored with a niche in the Pantheon of the great. Few even of these inscribe their names so high that they are not obscured by the accumulated dust of a century. The legal profession can therefore take pride in the fact that of all the great and good men gone, of the immortal few who were not born to die, none stands to-day higher in the respect and reverence of the American people than that able lawyer and matchless judge, John Marshall, the great Chief Justice. His renown is the richest inheritance of the American Bar. Above all the high places where the judges sit his name should be written in letters of gold where the sunlight may illumine and the dust not obscure, ever to encourage the judge to be brave and the lawyer to be true.

Early yesterday morning, as my train followed a narrow stream, winding its way to the valley through a mountain defile, where the pine trees had a silvery sheen in their garments of snow, suddenly there loomed up before me a peak o'ertopping all the rest, its snowy crest bright with sunshine. It reminded me of Chief Justice Marshall. The stream was the Republic, wind-



ing its then narrow way towards its present broad expanse, and high up on the lofty pinnacle of the Supreme Bench, towering above all, was the venerable Chief Justice, his white hairs illumined by the sunlight of genius, a tall man, sun-crowned, like that peak, catching the first rays of the morning sun, to hold them as a lamp to guide his countrymen out of darkness into light.

With this I close my humble tribute to the memory of Chief Justice Marshall. This is the immortelle that in your name I place upon his tomb. In honoring him we have honored ourselves.

May the Constitution as he construed it continue to be for another century our pillar of cloud by day and pillar of fire by night, so that when another hundred years has gone by, this people still under this Constitution may again take pleasure and pride in gratefully honoring the name of John Marshall.

## STATE OF WASHINGTON.

February 4, 1901, which by common consent has been designated as John Marshall Day, was celebrated by the lawyers and citizens of Seattle, generally, with patriotic fervor worthy of the historic occasion.<sup>1</sup>

The proceedings were planned and conducted by a general committee of the King County Bar Association, composed of the following gentlemen: Hon. C. H. Hanford, Chairman, Mr. John Arthur, Mr. Charles E. Shepard, Mr. Samuel H. Piles, Mr. John T. Condon, Mr. William H. Gorham and Mr. James J. McCafferty.

The forenoon was devoted to appropriate exercises in honor of the day at the State University and the public schools of Seattle. The address before the President, faculty and students of the University was delivered by Mr. Charles E. Shepard. The address at the High School was delivered by Mr. James J. McCafferty of the Seattle Bar, and at the Minor Grammar School by Austin E. Griffiths and James Hamilton Lewis, of the Seattle Bar. The main celebration in which the bar

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<sup>1</sup>The proceedings in Seattle were published in full, and embellished with an engraving after the Inman portrait of Marshall with the following title:

Celebration of John Marshall Day, February 4, 1901, at Seattle, Washington. Report of the Proceedings, including orations by Hon. C. H. Hanford and Mr. Charles E. Shepard. "Non illi vos de unius municipis fortunis arbitrantur, sed de totius municipii statu, dignitate commodisque omnibus sententias esse laturas. Cicero Pro Cluentio." Seattle, Washington: Lowman & Hanford Stationery and Printing Co., 1901.

and citizens generally participated occurred at a meeting held in the Grand Opera House in the afternoon under the auspices of the Law Department of the Washington State University, Frank P. Graves, President of the University, presiding. The oration was delivered by the Hon. Cornelius H. Hanford, United States District Judge. The members of the local bar, visiting judges and members of the bar residing at other places in the State attended the banquet in the evening, at which Mr. Samuel H. Piles presided. The addresses at the banquet were made by Judge Hanford, L. C. Gilman, John B. Allen, Frederick Bausman, Orange Jacobs, James H. Lewis, William H. White, Thomas J. Humes, James Bradley Reavis, John F. Dore, Edward Whitson, Corwin S. Shank, Charles E. Shepard and Will H. Thompson.

**Oration by Cornelius H. Hanford, U. S. District Judge.**

Thomas Carlyle's "Latter Day Pamphlets" contains a description of the conditions existing in the middle of the century now just closed, as they appeared to that author's cynical mind, in which he expresses his contempt for our country in these words: "My friend, brag not yet of our American cousins! Their quantity of cotton, dollars, industry and resources, I believe to be almost unspeakable, but I can by no means worship the like of these. What great human soul, what great thought, what great noble thing that one could worship, or loyally admire, has yet been produced there? None."

Perhaps no better answer to Carlyle's challenge can be made than by quoting the words of England's Grand Old Man, Gladstone, who said: "As the British Constitution is the most subtle organism which has proceeded

from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

The Constitution of the United States was ordained by the people of this Nation as the supreme law, binding the Government as well as each individual subject to its authority, and that this experiment of a government under a written constitution has been a grand success, instead of a dismal failure, is due in a large measure to the fact that from the beginning we have been blessed by having a Supreme Court to expound and enforce its principles, composed of men of vigorous intellects and robust courage, who were able to comprehend the plan of Government upon which the Fathers of the Republic constructed the Constitution and who gave a true interpretation of its provisions instead of a false interpretation. Pre-eminent among those illustrious patriots, history places Chief Justice Marshall, to whose memory this day has been dedicated. In answer to any man who sincerely and in good faith inquires, what noble thing has America produced which may be loyally admired, we may well point to the Constitution of the United States. And inseparably connected with this charter of human liberty is the name of its great expounder, Chief Justice Marshall. He was a man whose mind was clear and vigorous, whose judgment was sound, whose integrity was unblemished; he had a good heart; he dared to do right under all circumstances; he worthily filled the exalted station of Chief Justice for a period equal to an average life-time; and now, as the light of a full century illuminates his work, his merits command more and more the admiration of the civilized world. Among the world's greatest and best, there have been

few men of commanding presence, possessing extraordinary genius, and wielding great power for many years, who continued till the end of life to be so free from all pettiness, all eccentricity and all vices, and so full of all the graces of noble manhood, as our own John Marshall.

[Here follows a sketch of Marshall's private life and public services down to 1801.]

It was on the eve of a change of administration when President Adams appointed Marshall to be Chief Justice. His commission was dated January 31, 1801, and he was inducted into office one hundred years ago to-day, when for the first time the Supreme Court was convened in the City of Washington. Four weeks later President Jefferson was inaugurated. Jefferson hated Marshall, and to the end of his life regarded with disfavor the national judiciary as ordained by the Constitution. John Quincy Adams spoke the truth when he said that, if his father had done nothing else, he would have deserved the esteem and gratitude of the American people for having placed Marshall upon the Supreme Bench. If a man of a different stamp had occupied his place, Jefferson's ideas as expressed in the Kentucky Resolutions of 1798 might have prevailed, and the Government would inevitably have crumbled, and the Union would have been dissolved. State sovereignty was the central idea of the Resolutions of 1798, and they carried that idea to the extent of denying the power of the National Government to decide questions as to the constitutionality of acts of Congress, and of asserting that no act of Congress could have force within a State if its Legislature declared such act to be invalid or contrary to the policy of the State. The doctrines of nullification and secession were based



upon the same theory. The struggle to uproot those false doctrines was protracted and costly, and without such men as Marshall and Story upon the Supreme Bench, during the first thirty-five years of the last century, President Jackson could not have defeated John C. Calhoun's attempts at nullification in South Carolina, and the government would have been unable to collect its revenue or continue to exist.

Thirty-four years and five months Marshall occupied the seat of the Chief Justice. On the 6th day of July, 1835, he was removed from the greatest tribunal on earth by being summoned to appear before the court of omnipotent power, there to receive that justice which is unerring. His heart was pure, his habits were correct; in his mature years he continued to be gentle and simple in his manners as he was in youth; in the discharge of official duties and as the presiding judge of the Supreme Court, he was dignified, courteous, impartial, careful and accurate. The simplicity of his manners and the plainness of the clothes he wore are probably the only basis for most of the stories told of him indicating eccentricity of character. His life and example should be, and doubtless have been, and will be, a lesson to other judges, and an incentive to all who may be called to preside in the Temple of Justice, to respect the law and maintain those principles which constitute the only sure foundation upon which human liberty can rest.

Having given this brief sketch of the life of this great man and told you something of his character, it remains for me to speak with greater particularity of his work as expounder of the Constitution. A study of the reported decisions rendered by the Supreme Court during

Marshall's time shows that only thirty-six opinions were written by him in which questions of constitutional law were decided. The number is not large and some of the opinions are very brief, but taken altogether they are luminous in setting forth the fundamental principles of our Government. The first in chronological order is the case of *Marbury v. Madison*. Under an act of Congress authorizing the President, with the advice and consent of the Senate, to appoint justices of the peace in the District of Columbia, to hold their offices for a specified term of years, President Adams appointed Marbury to be a justice of the peace, and after the nomination had been confirmed by the Senate his commission was signed, but it had not been delivered when President Jefferson came in and Mr. Madison became Secretary of State. Madison refused to deliver the commission, and Marbury applied to the Supreme Court for a writ of *mandamus* to compel the Secretary of State to deliver the commission. The questions in the case were whether a member of the Cabinet could be coerced by the judiciary; whether a *mandamus* was the proper remedy; and whether the Supreme Court was the proper tribunal to issue a writ of *mandamus* in such a case. The opinion carefully lays down the law with reference to the duties of the heads of departments of the Government, showing that in so far as their duties as public officers are distinct from their duties to the President, they are bound by the law of the land, and subject to judicial process; that Marbury had a legal right to have his commission delivered to him, and that proceedings by writ of *mandamus* is the proper way to reach a judicial determination of the disputed questions in such cases, and compel the performance of official duty enjoined by law. The first and second ques-

tions were decided affirmatively, but the opinion held that the Supreme Court did not have original jurisdiction in such cases, and that it could not issue the writ.

This opinion has been criticised, the critics saying, that as the court did not have jurisdiction, the case should have been dismissed on that ground, without any discussion of other questions, but the critics failed to comprehend Marshall's purpose in going over the entire ground covered by the arguments of counsel, and failed to realize the force and effect of the decision. The opinion is admirable. When we take into consideration the fact that the case was one of first impression, it was well worth while for the court to express its sense of the rights involved. By sustaining Marbury's contentions on all other points, and dismissing his case for want of jurisdiction in the court to grant relief, the grand idea of the decision was greatly emphasized. That idea is that the Constitution is supreme, the judges are bound by their official oaths to support and defend it, the several departments must observe the plan of government embodied in it and keep within their respective spheres of action, and even the Supreme Court should not be tempted by an act of Congress to exercise a power which the Constitution intended to lodge elsewhere, though called upon to do so by a party having just cause to complain of his adversary, and a plain right to have redress by judicial process.

A government of laws and not a government of men, a government having ample power to protect every legal right and obligated to do so, by lawful means and through an appropriate agency,—that was Marshall's conception of the ideal which the Constitution makers had in mind. His energy was devoted to the task of making the government in practical operation a realization of that ideal,

and that thought and purpose permeate the decision. Set that great thought in contrast with Carlyle's vulgar abuse of the institutions and people of our country. He asserted that the monarchial is nature's form of government; that it is the privilege of the masses of mankind to be ruled by the few who are wise and strong, and that it is the business of the wise and strong to govern. He jeered at the idea of abolishing human slavery; he sneered at ballot boxes and constitutional government; he observed nothing in our country to approve, except roast goose and apple sauce as food for working men; Indian corn and bacon, and cotton, and dollars, and all the evidences of material prosperity earned by industry, he scoffed at, as things in nowise connected with true nobility of character. Eighteen millions of the worst bores the world has ever seen: that was Carlyle's estimate of the people of the United States in 1850.

And what answer to such cavil as this is made by the events of the last century and by the conditions actually existing now? It is not boasting to say that, with respect to courage, generosity, intellectual vigor, inventive genius, scientific research, love of literature, and the fine arts and social refinement, Americans have aspirations as high as the aspirations of any people in any age; their attainments so far have been meritorious, and they are progressive. The common schools of this country open the way for the children of all classes to the advantages of education. Universities, libraries and museums afford ample facilities for liberal education and advanced scholarship, and they are not neglected. A man in this country, though he be the man with a hoe, is not a brother to the ox. On the contrary, respect according to his deserts is assured to him, hope blesses his life, and the pathway to

the places of highest honor is open to him. The abolition of slavery in this country is an accomplished fact; accomplished by the valor, devotion and sacrifices of volunteer soldiers and sailors commanded by Grant and Farragut, and guided by statesmen of whom Abraham Lincoln stands at the head. In the last decade of the nineteenth century, the monarchs of Europe with their powerful military forces sat idly with folded hands, while the Turks massacred and outraged their neighbors by tens of thousands, but this Nation compelled Great Britain to submit her disputes with Venezuela to arbitration, and commanded that the oppression and extermination of the inhabitants of Cuba should cease. American fleets, composed of vessels constructed and equipped according to up-to-date ideas, and with Americans behind the guns, at Manila Bay and Santiago, in a few hours annihilated the navy of Spain, once the greatest maritime power in the world, and bade despotism be gone from the Western hemisphere and from the islands of the Pacific Ocean. We have introduced improved sanitary conditions, and diminished the rate of mortality among the people of the Islands, and commenced the education of their children. Our government is doing well its part in diplomacy, and we may rest assured that the result will be the opening of the door of the Orient to the commerce of the world, and the preservation of China from being parceled out as spoils of her conquerors. The glory of all our national success may be justly ascribed under God to the enlightened principles which governed in the construction and interpretation of the Constitution of the United States.

Lawyers are familiar with the cases entitled *Fletcher v. Peck*; *State of New Jersey v. Wilson*; *Sturges v. Crowninshield*; *M'Culloch v. Maryland*; *Dartmouth College v.*



Woodward; *Johnson v. McIntosh*; *Osborn v. Bank of the United States*; *Brown v. Maryland*; *Craig v. Missouri*; *Worcester v. Georgia*; *American Insurance Co. v. Canter*; *Cohens v. Virginia*, and *United States v. Judge Peters*, in all of which opinions were written by the great Chief Justice, expounding the principles of the Constitution of the United States, the powers of the National and State governments, and defining the duties, powers and limitations of power imposed by the Constitution upon the executive, legislative and judicial branches of the National Government and of the States. In some few instances, the accuracy of the decisions in these and other cases has been disputed by other courts; but at this day these cases are recognized as the highest authority, and have become so firmly established as to be in effect an integral part of the Constitution itself. In the case of *Gibbons v. Ogden*, decided in the year 1824, the Supreme Court held that the statutes of the State of New York granting to Robert R. Livingston and Robert Fulton the exclusive right to navigate waters within that State with steamboats, so far as they prohibited vessels licensed according to the laws of the United States for carrying on the coasting trade from navigating said waters, are void because in conflict with the clause of the Constitution which authorizes Congress to regulate interstate and foreign commerce, and the decision of the highest court of the State of New York sustaining the exclusive right granted by those statutes was reversed. The arguments to sustain the validity of the New York statutes were voluminous and powerful, and were considered by the court with the utmost respect, but met with the calm, irresistible logic characteristic of Marshall's opinions.

After referring to the cases above mentioned and to the trial of Burr, the orator proceeded:

The result of the trial of Burr was a public disappointment. Marshall was blamed and bitterly denounced. Abuse of the judge, indulged in by all classes of people, was directly encouraged by a message to Congress in which President Jefferson said: "I shall think it my duty to lay before you the proceedings and the evidence publicly exhibited on the arraignment of the principal offenders before the Circuit Court of Virginia. You will be enabled to judge whether the defect was in the testimony, in the law, or in the administration of the law; and wherever it shall be found, the legislature alone can apply or originate the remedy. The framers of our Constitution certainly supposed they had guarded as well their government against destruction by treason as their citizens against oppression under the pretense of it, and if these ends are not obtained it is of importance to inquire by what means more effectual they may be secured." A grand character like Marshall could not be much affected by a mere burst of popular displeasure. Conscious of the rectitude of his own conduct, he could well afford to wait for time and the deliberate judgment of his countrymen to vindicate the justice of his decisions. And now after nearly a century has passed, what is the judgment of the people? That Burr was guilty of plotting treason, that he intended to wrest from the United States all of its territory west of the Alleghany Mountains, and put himself at the head of a Western Empire, and make war upon countries at peace with ours, is undoubtedly true; but his unlawful schemes were exposed in time, and foiled by the prompt exertion of the National power. The verdict rendered was a true

verdict. That Burr, guilty of plotting against the government and seducing others to become disloyal, was suffered to escape punishment, is a matter to be regretted. But for the superstructure of the government to rest securely upon its foundation, it is necessary for the builders to hew to the line, let the chips fall where they may; and it was well that there was a man of Marshall's stamp in the seat he filled in his time, to teach the lesson of obedience to the law on the part of those intrusted with its administration, as well as on the part of all who live under its protection.

The traducers of Chief Justice Marshall have been many. Those who live in our time are fond of quoting the words of Jefferson, who wrote this: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing the Constitution from a co-ordination of a general and special government to a general and supreme one alone. . . . Having found from experience that impeachment is an impracticable thing, a mere scarecrow, they consider themselves secure for life; they skulk from responsibility. . . . An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty chief judge who sophisticates the law to his mind by the turn of his own reasoning."

Not long ago the president of the Georgia Bar Association, in an address which was published in the *American Law Review*, tried to conjure up ghosts to frighten the lawyers of that State. He told his audience that Marshall was not the most learned lawyer who ever sat

on the Supreme Bench, that Alexander Hamilton was not the greatest Secretary of the Treasury, but that Federal authority, centralization, absolutism and imperialism owe more to these than to any other two Americans, and that: "Between these on the one hand, and Jefferson and his school on the other, there was—and still is—an irreconcilable conflict. It has been fondly dreamed that Jefferson and his school won, and that absolutism in this Republic was forever made impossible by the growth of that democracy whose expounder and author was Jefferson. But the frightful ghost of Marshallism and Hamiltonism is resurrected in the modern Federal judiciary and stalks abroad unmasked." All such dark forebodings and evil thoughts may be likened to the shading of a fine picture, necessary to increase the pleasing effect, and which does not mar any of its lines of beauty. Instead of detracting from the greatness of Marshall's character, his enemies have raised him higher in the estimation of all right-thinking people. Against the petulant expressions of the author of the Declaration of Independence, I will set off the views of Charles Carroll, of Carrollton, the longest survivor of the signers of that historic document. In a letter to Hon. Richard Peters, dated June 28, 1827, now in possession of the Historical Society of Pennsylvania, Mr. Carroll used these words: "I consider the Supreme Court of the United States as the strongest guardian of the powers of Congress and the rights of the people. As long as that court is composed of learned, upright and intrepid judges, the Union will be preserved, and the administration of justice will be safe in this extended and extending empire."

William Wirt, the brilliant lawyer who took a leading

part in prosecuting Burr, expressed the prevailing sentiment of the best and ablest American statesmen, in a letter to President Monroe, referring to the Supreme Court in the following words: "If there are a few exasperated portions of our people who would be for narrowing the sphere of action of that court, and subduing its energies to gratify popular clamor, there is a far greater number of our countrymen who would wish to see it in the free and independent exercise of its constitutional powers as the best means of preserving the Constitution itself."

The address of the president of the Georgia Bar Association to which reference has been made, reproaches the Federal judiciary because ours is the only country in which the luxury of unconstitutional laws is denied to the people. I quote the words: "In fact, so nearly unquestioned is now the power of the Federal judiciary to annul a State or Federal statute on the ground of its unconstitutionality, that we sometimes forget that this is the only judiciary in the world at any stage of its history which has the power to thus blot a country's laws from her statute books."

Happily, if some Americans would prefer a government in which the power of Parliament is so transcendent and absolute that its acts cannot be questioned for any cause, we also find appreciation of the American plan on the other side of the water by men of learning capable of having earnest convictions, and of giving candid expressions of their opinions upon questions of government. A worthy representative of the class to which I refer is James Bryce, member of Parliament, and author of "The American Commonwealth." It is a pleasure to draw from such a source a tribute to our Supreme Court and its



greatest Chief Justice. I now quote a few excerpts from "The American Commonwealth."

After continuing the quotation (The American Commonwealth, I, p. 266) and quoting from the same volume (pp. 260, 261), the learned orator continued:

The admirers of Marshall do not claim that he was infallible, or more than a mere man having a share of human infirmities. Such personal faults as he may have had appear to have been covered by the mantle of charity, and I would not uncover them if that were possible. I have, however, taken some pains, in my examination of the records of his public services, to note any ground for just criticism, and I have found nothing which seems to me should cause regret except some of his decisions of questions affecting the rights of enslaved negroes. In these cases he enforced merciless laws, from a sense of duty, even when he was obliged to use expressions showing that his own feelings revolted. I will instance one such case.<sup>1</sup> In the year 1819 a Spanish vessel named the *Antelope*, with nearly three hundred Africans on board, was captured off the coast of Florida by a United States revenue cutter and brought into the port of Savannah. The An-

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<sup>1</sup> The *Antelope*. 10 Wheaton, 66. Judge Curtis in his reports of the decisions of the Supreme Court of the United States thus states the points decided in the case of *The Antelope* as follows: (1) The African slave trade is not contrary to the law of nations. (2) The right of search is a belligerent right only. (3) One nation cannot execute the penal laws of another, and consequently a foreign vessel, engaged in the slave trade, cannot lawfully be captured by an American cruiser. (4) Slaves illegally captured were restored to a foreigner who showed himself to have been in possession at the time of the capture; the court being equally divided in opinion, and consequently the decree of the court below to that effect affirmed; but if no such proof of possession is made by any individual the slaves must be delivered to the United States. — [Editor.]

telope had been dispatched by a Spanish mercantile house in Havana to the coast of Africa for a cargo of slaves, and after receiving on board between ninety and one hundred she was captured by a piratical vessel named the Arraganta, which had been fitted out at Baltimore and was commanded and manned by men who were citizens of the United States. The Arraganta had previously taken twenty-five Africans from an American vessel and one hundred and thirty from other vessels sailing under the flag of Portugal; the captain and most of the crew of the Antelope were put ashore and their places supplied by Americans from the Arraganta, and the two vessels proceeded together to the coast of Brazil, where the Arraganta was wrecked, the Africans on board of her, who were not killed or drowned, were transferred to the Antelope, and subsequently that vessel was captured and taken to Savannah as I have stated. In the legal proceedings which ensued, the government of the United States claimed all the Africans, pursuant to acts of Congress providing that slaves imported into the United States or captured on vessels found hovering near our coasts should be returned to their own country and liberated. The Spanish vice-consul claimed the vessel and as many of the Africans as were on board of her when she was captured by the Arraganta, in behalf of the Spanish owners of the vessel. The vice-consul of Portugal also claimed part of the Africans taken from vessels supposed to have been owned by subjects of the King of Portugal, in behalf of such unknown owners. The Circuit Court rendered a decree awarding sixteen of the Africans to the United States, and dividing the remainder between the Spanish and Portuguese claimants. An appeal was taken by the United States to the Supreme Court, and splendid

arguments were made before that august tribunal in favor of liberty for the whole company of unhappy captives, by William Wirt, Attorney-General of the United States, and by Francis Scott Key, author of the Star Spangled Banner, showing that the slave trade, according to the methods by which it was known to be prosecuted, was contrary to the law of nature and criminal *per se*, the same as robbery and piracy, and therefore no legal right of property in captive negroes should receive judicial recognition. It was also maintained that the legal presumption being in favor of liberty, the *onus probandi* was cast upon the claimants to establish their titles by legal evidence; that these captives were not prisoners of war, and no evidence had been produced tending to prove that any of them had been purchased in any market, and therefore the claims of the representatives of Spain and Portugal should be dismissed for want of evidence to sustain them. The opinion of the court, written by Marshall, shows that these arguments touched the sensitive chords in the composition of the judges, but they felt impelled to resist the influence of their personal feelings by their sense of duty to decide according to their conception of what the law required. In the introductory part of the opinion the Chief Justice said: "In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence worthy of the questions that have been discussed; this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law."

By its decision the court rejected the claim of the Portu-

guese vice-consul in behalf of unknown parties for want of evidence to support it, but sustained the Spanish claim to as many of the Africans as could be identified; and thirty-nine were actually surrendered to the representative of Spain to be delivered to their brutal captors. The decision is undoubtedly erroneous, for, by the terms of the treaty between the United States and Spain, our government was only obligated to endeavor to restore property captured by pirates to the true owners, and the Spaniards had no right to claim restoration of the Africans without submitting proof to establish their claim of title. The principles which governed in the determination of the claim asserted by the representative of Portugal, if carried to a logical conclusion, must have defeated the Spanish claim also. The decision is a confession of its own rank injustice, but the opinion strives to justify it by arguing that long continued practices of civilized people cannot be dealt with by the courts as unlawful, until made unlawful by the legislature; for it is not a judicial function to initiate reforms, or change established policies and usages. It was held that the Spanish law, which sanctioned the nefarious business under the pious pretense of a benevolent wish on the part of his Catholic Majesty to Christianize the negroes, was the law of the case for the Spaniards, upon the authority of previous decisions in similar cases by Sir William Scott, more generally known by his title of Lord Stowell. More than all else I have found chronicled, that decision shades the brilliancy of Marshall's reputation, but when it was rendered the world was yet in darkness, so that the court was not able, even with the light shed upon the case by the arguments of Wirt and Key, to perceive any difference in legal status between a ship-load of negroes and a

herd of cattle, and it was wrongly assumed that mere possession of the captive negroes was sufficient evidence of their ownership. The human mind is so constituted as to be paralyzed to a sense of right by familiarity with wrong. Crimes such as piracy, which in this era of progress are the most universally detested, have been in times past sanctioned and cultured by the consciences, supported by the bigotry of ultra-Puritans as well as Christians of the Catholic faith. As an interesting example, I will introduce here a letter written in the year 1682 by one of the beacon lights of New England Puritanism and a graduate of Harvard University. After the date of this letter the writer's father became president of that venerated institution of learning, and was the first to receive from it the honorary degree of Doctor of Divinity. The letter is as follows:

September ye 15, 1682.

To ye Aged and Beloved,

Mr. John Higginson.

There is now at sea, a ship called the *Welcome*, which has on board an hundred or more of the heretics and malignants called Quakers, with W. Penn, who is the chief scamp, at the head of them.

The general court has accordingly given secret orders to Master Malachi Huscott, of the brig *Porpoise*, to way-lay the said *Welcome*, slyly, as near the cape of Cod as may be; and make captive the said Penn and his ungodly crew, so that the Lord may be glorified, and not mocked on the soil of this new country, with the heathen worship of these people.

Much spoil can be made by selling the whole lot to Barbadoes, where slaves fetch good prices in rum and sugar, and we shall not only do the Lord great service



by punishing the wicked, but we shall make great good for his minister and people.

Master Huscott feels hopeful, and I will set down the news when the ship comes back.

Yours in ye bowels of Christ,

COTTON MATHER.

Happily, the good ship *Welcome* saved the founders of Pennsylvania from an awful doom by giving a wide berth to Cape Cod and the brig *Porpoise* with her crew of Puritan pirates lying in wait there.

I am conscious of having sufficiently taxed the patience of my audience, without having exhausted my subject. It is impossible in one address to epitomize all the important questions decided by the Supreme Court during the incumbency of Chief Justice Marshall, and I dare not attempt to summarize the work of his life. It would be claiming too much to say that in his time the Supreme Court completed the interpretation of the Constitution. That work has not been completed to this day, and it will go on indefinitely. New conditions are continually giving rise to new questions which have to be adjudicated, but this is true: Marshall lived to see the Government of the United States in successful operation, after all of its parts had been fairly tested. It was his master hand which adjusted the delicate mechanism of its machinery, and demonstrated the practicability of working successfully under our Constitution; he developed the powers of the judiciary as a co-ordinate branch of the Government, marked plainly the limits of constitutional authority, and the courts in which he presided set a noble example of firmness in refusing to transgress the boundaries fixed by the Constitution as the limit of power; and while teaching the people to respect the courts by

being respectable, also inspired confidence in the courts by being worthy of confidence.

Viewed in the light of all his achievements, and his errors as well, considering the conditions and circumstances which environed his life, the encomiums upon his character paid by his admirers, the detractions of his defamers, and the unerring work of time in the vindication of truth, John Marshall's title to honorable distinction among the world's noblest men is now well established. The observance of this centennial anniversary by the American people will, I hope, have a good effect in stimulating all to study the principles of the government under which we live, and in riveting the affections of his countrymen to his memory, so that, in the estimation of all, his place among men who have worked for the uplifting of mankind, and accomplished much, shall be by the side of Washington and Lincoln.

**Address of Charles E. Shepard.<sup>1</sup>**

The figure of John Marshall looms large in the stirring and crowded pageant of the nineteenth century. For that portion of his life which made him famous and by reason of which we are met to do him honor, he was a lawyer and a judge, a man of the book, the pen and the closet, his hours were spent apart from the busy throng of his day, and his writings were unfamiliar to most of his contemporaries, as they are to most of us, too; yet every humblest citizen of this nation to-day feels, however unconsciously, the beneficent force of his genius, transmitted through the political and legal fabric. It is fitting that the people whom he has so benefited should

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<sup>1</sup> Delivered before the faculty and students of the State University on "John Marshall, the Greatest of American Jurists."

look up from the gainful business of the day to think and speak of him; and it is doubly fitting that we here, all of us engaged at one stage or another in the pursuit of the things of the mind, should honor him who without the external aids and shows of power has shed such glory on the human intellect, and has done so much to build the lasting empire of reason, justice and law. Recognizing these facts, and the duty of the American people to take proper notice of our great debt to John Marshall, the American Bar Association has recommended that appropriate ceremonies be held on this day in all American colleges, law schools and public schools, "to the end that the youth of our country may be made more fully acquainted with his noble life and distinguished services."

[After giving an outline of Marshall's life and services before his appointment as Chief Justice the speaker proceeded:]

It is by reason of his career on the bench that John Marshall is and will ever be famous, and that peculiar honors are paid to him at a day so remote from his own times. His other achievements, meritorious as they were and deserving of contemporaneous gratitude and local remembrance, were no greater than those of many another able and high-minded patriot of his and later days, and were not such as to preserve his name among any but special students. A rapid sketch of his earlier career was necessary to show us the man, the patriot and the statesman, and to lead us to a proper and just view of the judge; but solely because he was the pre-eminent judge that he was, are we here in his honor to-day. Yet even this remark does not compass the whole truth about Marshall's peculiar fame. Military and naval heroes, the men of action, are remembered and honored by their

countrymen much longer, oftener, more fervently, than the men of thought and of books. Many and many an eminent judge in our country and in England, one with us in speech and almost one in law, has long and ably served his day and generation, has been a really great judge, has broadened the scope of the law, rectified its boundaries and divisions and elevated its standards nearer to the pure air of ideal justice; and yet he has received no such special honors. The lawyers who come after him admire his talents and revere his character; but they never think of special observances such as these. Why, then, should John Marshall be so honored?

We shall find the answer to this question by considering the nature of our government and Marshall's relation to its historic development. If we were an assemblage of lawyers, we would find interest and instruction in a critical study of his principal decisions, in weighing his judicial style and mental processes. But as Marshall was more than a lawyer and a judge, so we may take a wider than professional view and try him by other than technical standards.

The Supreme Court of the United States was formally inaugurated at New York City on Tuesday, the second day of February, 1790. It was not intended to be and was not a court of additional appeal from the highest courts of the States, so as to afford dissatisfied suitors another opportunity to try questions of local law. It was, and was intended to be, a court of appeal on all questions arising under the constitution and laws of the United States, and in controversies between different States or citizens of different States. But for the first eleven years of its existence there were naturally but few cases before the court; two of its Chief Justices and some

of its Associate Justices held other and political offices; and the court did not gain in public esteem and influence equally with the other branches of the government. So the day of Marshall's accession to the bench, almost coinciding with that of the court's inauguration eleven years earlier, may be called the second birthday of the Supreme Court. For under his leadership, masterful, unswerving in adherence to the primary principles of the law and of our government, and fearless in decision, the court became in his life-time the greatest and most renowned court of law in either ancient or modern times. Doubtless this was partly due to the subjects with which its decisions dealt, the great controversies which were there debated and closed, reaching down to the very bed-rock of the Union, the States, their divided sovereignties and distributed powers. But if these subjects and controversies had not fallen into a master's hand, they would have brought to the court pity or scorn for its inadequacy, rather than honor and reverence for its signal power. And throughout that thirty-four years that master was John Marshall. He had able associates, whose judicial writings left their impress on the law and whose names are held in honor by their successors and by the bar. But Marshall overshadowed the others and made the court what it became. Story, who sat with Marshall on the bench for over twenty years — a very different type of mind, of vast learning and ceaseless industry — in a commemorative address after death had closed the record of Marshall's labors, said: "His proudest epitaph may be written in a single line: Here lies the Expounder of the Constitution of the United States." A noble title, which the severe tests that time applies to all human achievement have only cut deeper in the monument of his fame.



In this his chief title to fame we approach an answer to our inquiry after the causes of these unique honors. And if we pursue the inquiry over a wide field, we shall only become the more convinced that he who by chance or native power imbeds his name in the deep and broad bases of a colossal structure of government gains a renown which will endure while that structure stands.

The idea and the daily fact that we live under a dual government, one part national, extending over the whole country, the other part local, limited to a region which we call a State, each with its distinct mechanism of distributed powers, each supreme in its sphere and impotent out of its sphere,— the idea and the fact that this national government and each of these state governments has its being solely through and by a written formulary called a Constitution, is so trite, so familiar to every intelligent citizen, even to the American youth and maiden in school or college, that we think of it almost as a part of nature. Yet it is little over a century since these wonderful contrivances for carrying on a government both strong and free have been known to the world. We study in our books of history about the English Constitution, and we learn to admire it for its noble safeguards to liberty. But it is not to be found in any single writing; it consists of various acts of Parliament, Magna Charta, the Bill of Rights and others, and of a large body of unwritten custom and practice venerable for their hoar antiquity. Over all these the English Parliament is supreme. It can repeal Magna Charta to-morrow; it can pass a bill to change the succession to the throne; it can sweep away the customs of ages, the statutes of the realm, and the decisions of the courts of a land

“Where freedom slowly broadens down  
From precedent to precedent;”

and it can replace the "royal republic" of to-day by the mediaeval throne of the Tudors. Doubtless, Parliament never will do that, but there is nothing which legally forbids it to do all that and more. The idea that the English Constitution is to be found in no one instrument, that Parliament is supreme over all the other powers and branches of government, even to removing the judges or changing the king, and that any statute which it chooses to pass is law, was bred into the bone of every English and by consequence every American lawyer in the eighteenth century. They could not readily see that the written constitutions of the Union and the States introduced a theory the very opposite to this.

It is true that the germ of a self-imposed limit to sovereignty was hid in some of the historic acts of Parliament; that the charters granted by the kings to the colonies were the incomplete forerunners of the constitutions embracing the entire scheme, powers and limits of the governments which they set up after their revolt; and that leagues of independent States or communities of freemen were not new to the world when the colonies, finally freed at Yorktown, became the United States of America. But all such leagues had been partial and limited, like the Amphictyonic league of Greece, or loose-jointed, with its members sometimes at civil war, like the old German empire, or too centralized, tending to end in a single central power. In no such system hitherto had a nice and just balance between the centrifugal and centripetal forces kept the planets from flying off into space, or falling into their sun, or rushing into chaotic anarchy. When, therefore, the Union began its existence in untried fields of politics, its Constitution contained three ideas novel singly and combined to many, viewed with distrust and

aversion by able patriots and statesmen, running counter to all the training of the lawyers and many a lesson of history. These ideas were: that the Legislature could not pass any law it chose, was not supreme, but there was a higher power; that each of the branches and powers of the Government was limited to its fixed sphere by "the People of the United States," who alone were supreme, and in making the Constitution had made them; and, thirdly, that neither the States nor the Union had unlimited sovereignty over the other. But if these several powers did not keep to their several spheres, there were the elements of discord, perhaps of disunion and war; encroachments, through the greed and grasp of power, by Congress on the Executive or Judiciary; or by the Federal Government on the people, or by the Union or the States on each other. Yet how should they be made to obey their limits? Where was the final arbiter? The stoutest-hearted patriot who had calmly faced battle, defeat and a traitor's grave, quailed before this complicated mechanism with all its chances of ruin.

There was a fourth idea or element inherent in the Constitution by which the whole Government, all its parts and all the States could be kept within their prescribed limits. The Constitution declared that it "and the laws of the United States made in pursuance of it shall be the supreme law of the land, . . . anything in the Constitution or laws of any State to the contrary notwithstanding." But who was to determine whether there was a conflict or not? There were various plausible theories. Some thought that each of the three branches of government, the Executive, the Legislative and the Judicial, must be the judge of its own powers. Some that each State, as a sovereign which for the com-

mon weal had given up part of its powers, had the reserved prerogative of all sovereignty to decide when it had suffered encroachment, and it must be the final judge of its own powers. This was the States' Rights doctrine which led to nullification in 1833 and secession in 1861. And there was the Federalist view that the Constitution was not a compact between sovereign States, but was made by the people as a Nation, and set up a government which had powers adequate to decide all conflicts.

This fourth idea or element, not explicitly stated, not so clearly implied in the Constitution as to be beyond plausible debate, was the power of the Judiciary to bring any law of Congress, any act of any officer or branch of the Government, any law of a State or act of its officers to the test of harmony with the Constitution, and if it failed to meet that test then to pronounce it illegal and void. Here, then, was a balance-wheel to keep each element of the whole in its due limits. This was the unique power which before this nation was founded no court ever held. And it is the unique glory of John Marshall that he clearly perceived that the Constitution inevitably implied that in the Judiciary, whose province alone it is to decide and apply the law, was vested this power, that he worked out the idea by irrefragable logic, and that he applied it to a series of cases presenting all phases of the subject, through many years, heedless of the clamors of political enemies, of the frowns of hostile administrations, and of the threats of armed resistance to the court's decrees.

It is true that this great principle was involved in the framework of our government, and in time might have been developed — that another might have done it. But *he* did it. It is true that in some few decisions of State

courts, earlier than Marshall's accession to the bench, this idea was mooted and the validity of State statutes doubted or denied; but these decisions were unknown to all but a few local lawyers and judges, for in those days all the decisions of all the courts were not printed the next week. And in no case was this vital question as to the powers of Congress and of the Federal courts respectively presented and decided until 1803, when, in the suit of *Marbury v. Madison*,<sup>1</sup> Marshall squarely met and decided it. In that, as in nearly every case involving constitutional questions while he lived, Marshall was the pen and voice of the court. He held that neither the Executive nor the Congress was exempt from judicial review of their acts; that our government was one of laws and not of men; that when executive officers, even members of the cabinet, violated a legal right of a citizen, the court would compel them to do justice; and that an act of Congress giving to the Supreme Court authority which the Constitution did not justify was void. Thus at the same time the court exercised the exalted jurisdiction of repressing the unlawful acts of the other two departments of government and rejecting a power wrongly given to itself.

The opinion in *Marbury v. Madison* is the cornerstone of what the lawyers call "constitutional law." Before that it did not exist. In all the vast mass of the law like an enormous pile of architecture, built up by the toils of many generations, and exhibiting the style of every age, there was no apartment for the law of the Constitution — and inevitably so, as we have seen. But John Marshall not only founded this branch of law; he built a substan-

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<sup>1</sup> 1 Cranch, 137-180.



tial part of the structure, and of the rest since his time most is but the development of his plans.

Marshall's long judicial career — one of the longest ever led — is an emphatic example of the value of an independent judiciary and of long terms, even of life tenure. Much may truly be said in favor of the now usual plan of an elective judiciary for short terms; but at least the long term in Marshall's case was justified by its fruits. He worked on, unceasing, unceasing, unceasing for a third of a century; he was unmoved by the rise and fall of parties and administrations; the vision of a coming election never passed athwart that clear, penetrating, judicial eye. In the trial of Aaron Burr for high treason, the administration of Jefferson brought all its power to bear to procure a conviction, and the effect of an acquittal on Marshall's reputation was hinted at from the bar. But he followed the law with cold and impersonal logic, and only took notice of remarks to influence his judgment with these noble words:

“That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.”<sup>1</sup>

After Burr was acquitted by the decision of Marshall that the evidence did not show him guilty of treason,

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<sup>1</sup> *United States v. Burr*, 4 Cranch, 470-507, at p. 507.

some one asked Wirt, the eloquent lawyer who led the prosecution: "Why didn't you tell the Chief Justice that the people of America demanded the conviction of Burr?" "Tell *him* that?" said Wirt, "Tell him *that*? I should as soon have told Herschel, the astronomer, that the people insisted that the moon had horns as a reason why he should draw her with them!"

But the long term had also the equal merit of producing by slow accumulation a monumental result. Judicial work must needs be slow to make its mark, because the mark is made, as it were, by multitudinous strokes. Meteoric men, in the arts, in literature, in war, condense into a brief and fevered span the quintessence of life and leaving a dazzling, even a lasting, result. But it cannot be so with the judge, who to excel must, like the coral, build by slow accretions. And if his work is clear, rational, consistent, if he does not pull down this year what he built last year, nor blench in the face of criticism, but fares right on; above all if his work is sound, agrees with the spirit of the law and the genius of the people, then he becomes a great judge.

If Marshall had done no more than establish the principle of the supremacy of the Constitution and the power of the court as its expounder, high though his rank, he would not have occupied the exalted niche he does. It is the way he applied this fundamental doctrine, and the ends and effect to which he applied it, that crown and finish his fame.

In the course of his career, the Supreme Court under his lead, by decisions mostly written by him, established the supremacy of the United States for all national purposes over the separate States; the subordination of State legislatures and State courts in all national questions to

the Federal courts; the subordination of Congress and of the President to the limits of the Constitution; the supreme power of the United States to create national banks and other fiscal agencies, free from tax or other burden imposed by the States, because, as the court said: "The power to tax is the power to destroy;" the exclusive power of Congress to regulate commerce among the States and with foreign nations; the power of Congress to naturalize citizens, to lay taxes, to control public lands, to maintain and control armed forces, to promote internal improvements by great highways on land and water. They held that the rights of property are just as secure and sacred as those of persons; for, as was said long after, where either is insecure both are, and there can be neither prosperity nor progress. They held in the famous case of *Dartmouth College*<sup>1</sup> that a charter granted to a corporation was a contract and could not be impaired by later act of the Legislature without its consent, because the ægis of the Constitution was held over it. And in the case of *Cohens v. Virginia*<sup>2</sup> it was determined that the citizen who was oppressed by a State law or a decision of a State court, in violation of some clause of the National Constitution, has a sure refuge in the Supreme Court of the United States because it has power to test by that Constitution all such State laws or judgments. This case has been a strong rock of defense against attacks on the liberties and rights of the agents of the Union or other States directed by political hostility or sectional jealousy.

In all of these decisions and many other like ones in Marshall's time, one spirit breathes through all—the spirit of nationality. In none has he more clearly stated

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<sup>1</sup> 4 Wheaton, 518-715.

<sup>2</sup> 6 Wheaton, 264-447.

the opposing views as to the power of the United States — whether it is subordinate to the States or superior — than in *Cohens v. Virginia*,<sup>1</sup> where the State violently opposed a review of the judgment of its court.

[The speaker here quoted from the opinion in *Cohens v. Virginia* several passages expressing its principal ideas and arguments.]

If these extracts<sup>2</sup> weary you, if they state but commonplace which no one now denies, remember that John Marshall made them so. They were contested by the ablest talent for many years in his court, in the halls of Congress and on the stump. It was Marshall's opinions, reiterating this doctrine of the supremacy of the Union, of the reality and unity of the Nation, year after year, in new cases, in every phase of fact, which immensely aided in arousing the spirit of nationality. The conditions of daily life were not then what they are now. Travel was limited, communication slow, interests and thoughts local, not national. The masses knew little of Marshall's opinions; but the lawyers, judges, statesmen, the men of thought, read them, and from them his teachings filtered downward. His firm conviction that we were a Nation, his clear arguments to prove it, had much to do with the ardent patriotism of a later generation which spent life without stint that his doctrines might remain true. And not merely in general abstractions but in the practical conduct of the government have his decisions strengthened and broadened the Union. We owe it largely to him that in the throes of civil war our national banks could not be taxed to death and our bonds for war-loans driven from the market by hostile State administrations; that our great banking system could grow up unhampered

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<sup>1</sup> 6 Wheaton, 264-447.

<sup>2</sup> From *Cohens v. State of Virginia*, 6 Wheaton, 376, 377, 413.

to carry on our enormous commerce; that our mighty agencies of commerce can pass unhalsted, unlicensed and unvexed from State to State; that public and private contracts have been kept inviolate; that our natural resources have been developed rapidly because the investment of capital in corporate forms has been safe; that the attacks of State legislatures on private property in the frenzy of passion at fancied wrongs have been repressed; that the common rights of every citizen are as safe in every other State as in his own; that the State courts have been forced to render to every one, alien, non-resident or citizen, all the rights secured to him by the Constitution; that throughout the land all local courts now without question recognize and obey that higher law, unchangeable because the people never want to change it, uniform, while the local law in each State differs and often changes, unifying because it is a common bond and safeguard to all.

Behold here a signal instance of the personal element in history. That there is an impersonal element also, that the spirit of the time, the genius of the race, the influences of external nature profoundly affect history, is no doubt true. But the theory of evolution as applied to history is sometimes taught as if all men were but the puppets of a blind, impersonal destiny or fate. This is to ignore the other truth — the power of the individual. It is not in our stars but in ourselves that we yield to or modify the course of events. The chair of the Chief Justice was to be filled by some one or more from 1801 to 1835; but during that critical era, when the people were either to draw together with the sense of nationality or to veer off into distrustful and discordant provinces, it was of vast moment who and what the occupant should be. If John Marshall had been a states' rights theorist, the young giant of the nation instead of hardening his gristle into



bone would have been enfeebled and emasculated, the Federal Government would have been defied, its courts contemned, the Union would have but repeated the fiasco of the Colonial Confederation. We would either have had separate, perhaps warring commonwealths, or the man on horseback instead of the men of the long robe would have given us an empire — continental indeed, but of the sword, not the law. If Marshall, though adopting the national theory of the Constitution, had been a weak or timorous man, if he had paltered in applying the true doctrine after once laying it down, and shrunk from the prospect of hewing to the line of the law as he saw it, the forces of resistance to national supremacy would have gathered head; the court would have beaten a retreat at some critical point. But as it was he followed the line of thought to which his reason led him, steadily, consistently, fearlessly; and in time the work that he did showed to the world the sublime spectacle of a court without the power of the purse or the sword, sitting in a quiet chamber at Washington, saying to the Congress of a great nation: "Thus far shalt thou go and no farther," bidding powerful commonwealths keep to their allotted spheres, and extending over the continent the empire of a body of law, a system of justice, alike and unchangeable everywhere, peaceable because resistless.

Here, then, was the true empire builder; here was the real strenuous life — a life not of eager and bodily activity in the fleeting affairs of the day, but of work for all time. For there is a strenuous life of the brain as well as of the body, and he who lives it is often the greater benefactor of his kind. In a season of storm and stress the Hebrew prophet had a vision of the time when justice should cover the earth as the waters cover the sea. It was the great glory and the imperial task of John Marshall measur-

ably to realize this vision in our land by establishing justice within the scope of the Federal Constitution and government. This was his great and high work —

“Too great for haste, too high for rivalry.”

He did more than expound the Constitution; for by doing that he made the nation conscious of itself — of its own life and power. We give to him lasting honor, because he gave to us as freemen and as citizens an imperishable heritage.



# APPENDIX.

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- I. EULOGY OF HORACE BINNEY.
- II. EULOGY OF JUSTICE STORY.
- III. ADDRESS OF EDWARD J. PHELPS.
- IV. ADDRESS OF CHIEF JUSTICE WAITE.
- V. ORATION OF WILLIAM HENRY RAWLE.
- VI. RESOLUTIONS OF BAR ASSOCIATION OF PHILADELPHIA, 1831.
- VII. ADDRESS OF NATIONAL COMMITTEE OF AMERICAN BAR ASSOCIATION ON JOHN MARSHALL DAY.





## APPENDIX.

### I.

#### Eulogy on John Marshall, by Horace Binney.<sup>1</sup>

*Fellow Citizens:* The Providence of God is shown most beneficently to the world in raising up from time to time, and in crowning with length of days, men of pre-eminent goodness and wisdom. Many of the undoubted blessings of life, which minister, and were designed to minister, to the elevation of man, tend, nevertheless, by developing the inferior qualities of his mixed nature, to impair the authority and to deaden the aspirations of his immortal spirit. The unnumbered contributions to the sum of physical enjoyment which a bountiful Creator has spread around us afford such a prodigal repast to the senses, that if man were not sometimes allured from the banquet by the example of wisdom, or driven from it by the voice of conscience or of inspiration, he would "decline so low from virtue" as to become incapable of discerning its beauty, or of rising to its delights. If there was not something within or without to remind him that these pleasures of sense were designed to alleviate the labors of virtue in her arduous career, and not to seduce her from it, it might raise the irreverent question, whether the frame of man was adequately devised to contend with the temptations which surround him. But the wisdom of the Creator is justified in all his works. It is a provision in the moral government of the world to hold out constantly to man-

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<sup>1</sup> On July 9, 1835 (three days after the death of Chief Justice Marshall at Philadelphia), the Select and Common Councils of the city invited Horace Binney, an illustrious member of the Philadelphia Bar, to deliver an "eulogium" upon the life of John Marshall. Appropriate solemnities took place on September 24, 1835, when the great oration of Horace Binney was delivered on "The Life and Character of John Marshall," and the Councils requested a copy of the oration for publication. This famous oration is here republished in full. See Introduction, Vol. I, p. xii.

kind both the example of virtue for imitation, and its precepts for obedience; and the moral constitution of man is never so depraved as to be totally insensible to either. Sometimes the inducement to virtue is derived from the catastrophe which closes the career of vice; sometimes from that internal monitor, which, however oppressed by a load of crimes, has always sufficient remains of life to breathe its complaints into the hearts of the guilty. To the sensual it often comes in the pains and disgusts of satiety, and occasionally to the most hardened in the awakening denunciations of future responsibility. The good find it in the pleasures of beneficence, and the wise in the enjoyments of wisdom. It is addressed severally to each, and with endless variety corresponding to his personal case and condition. But it comes to all, and at all times, and with most persuasive influence, in the beautiful example of a long career of public and private virtue, of wisdom never surprised, of goodness never intermitted, of benignity, simplicity, and gentleness, finally ending in that hoary head which "is a crown of glory, if it be found in the way of righteousness." To this example all men of all descriptions pay voluntary or involuntary homage. There is no one from whom the impress of the Deity is so wholly effaced as to be insensible to its beauty. The very circumstance of its duration affects all hearts with the conviction that it has the characters of that excellence which is eternal, and it is thus sanctified while it still lives and is seen of men. When death has set his seal upon such an example, the universal voice proclaims it as one of the appointed sanctions of virtue, and if great public services are blended with it, communities of men come as with one heart to pay it the tribute of their praise, and to pass it to succeeding generations with the attestation of their personal recognition and regard.

It is such an example and such a motive, my fellow-citizens, that have led the councils of this city to commit to my hands the duty of expressing your admiration and gratitude for the illustrious virtues, talents and services of John Marshall. His last hours were numbered within your city. His unfading example here received its last finish. You were the first to mourn by the side

of his venerable remains, after the spirit which enlightened him had gone to its reward; and you now claim to record your reverence for a name which after first coming to distinction in its native State, and then for a long course of years shedding lustre upon the whole country, has finally ceased to be mortal upon this spot.

If its defective commemoration by me could mar the beauty of this example, I should shrink from it as from a profanation; but it is the consolation of the humblest, as it ought to be of the most gifted, of his eulogists, that the case of this illustrious man is one in which to give with simplicity the record of his life is to come nearest to a resemblance of the great original; and to attempt to go beyond it is

with taper light

To seek the beauteous eye of Heaven to garnish.

John Marshall was born at a place called German-town, in Fauquier county, Virginia, on the 24th of September, 1755, eighty years ago this day. It was a little more than two months after the memorable defeat of Braddock had brought to the notice of the British empire the name of George Washington, then a youth of twenty-three, whose courage and conduct in that disastrous surprise were afterwards to be the grateful theme of his faithful historian and friend.

His grandfather, of the same name, was a native of Wales, who settled in Westmoreland county about the year 1730, where he married Elizabeth Markham, a native of England. Of four sons and five daughters of this marriage, Thomas, the father of the Chief Justice, was the oldest, and inherited the family estate called "Forest," consisting of a few hundred acres of poor land in Westmoreland. He removed from this county to Fauquier soon after he attained manhood, and having intermarried with Mary Keith, by which he became connected with the Randolphs, he sat down upon a small farm at the place where John Marshall, his oldest son, was afterwards born. The great proprietor of the northern Neck of Virginia, including Fauquier, was at that time Lord Fairfax, who gave to George Washington the appointment of surveyor in the western part of his territory, and Washington employed Thomas Marshall in the same business.

They had been near neighbors from birth, associates from boyhood, and were always friends.

Thomas Marshall was a man of extraordinary vigor of mind, and of undaunted courage. When his associate and friend received the command of the American armies in the war of the Revolution, he left his estate and his large family, then, or soon after, comprising fifteen children, and embarked in the same cause. Filial respect and affection have recorded of him that he commanded the third Virginia regiment upon the continental establishment, and performed with it the severe duty of the campaign of 1776. On the 26th of December in that year, he shared the peril as well as the glory of that enterprise, not surpassed in vigor or brilliancy by anything in the Revolution, in which the Hessian regiments at Trenton were surprised and captured by troops who had passed the previous night in contending with the snow and hail and the driving ice of the Delaware.

He was afterwards on the 11th of September, 1777, placed with his regiment on the right of the American Army at Brandywine, and received the assault of the column led by Lord Cornwallis. "Though attacked by much superior numbers, the regiment maintained its position, without losing an inch of ground, until both its flanks were turned, its ammunition nearly expended, and more than one-half of the officers and one-third of the soldiers were killed or wounded. Colonel Marshall, whose horse had received two balls, then retired in good order to resume his position on the right of his division, but it had already retreated."<sup>1</sup> We may believe that from such a father the son would derive the best preparation for a career that was to exemplify the virtues of fortitude, patriotism and invincible constancy in the maintenance of what he deemed to be right.

After residing a few years at Germantown, the father removed with his family about thirty miles farther west, and settled in the midst of the mountains east of the Blue Ridge, at a place called "The Hollow," in a country thinly peopled and destitute of schools, but remarkable for the salubrity of its atmosphere and the picturesque

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<sup>1</sup> Marshall's Washington, 158.



beauty of its mountain scenery. It was a place altogether admirable for the formation of a physical constitution, and for the development of its powers by athletic exercises and sports; and it was here that the son remained until his fourteenth year, laying the foundation of that vigorous health which attended him through life, and deriving from his father all the training in letters which a then frontier county of Virginia, or the moderate resources of a farmer, could afford. At the age of fourteen he was sent for instruction in Latin to a clergyman named Campbell, who resided in Westmoreland, with whom he remained about a year, having for one of his fellow-students James Monroe, afterwards President of the United States; he then returned to his father, who about that time removed to the place called Oak Hill, which still remains in the family. He here received for the term of another year some further instructions in Latin from a Scotch gentleman named Thompson, who was the clergyman of the parish and lived in his father's family; and this was the whole of the classical tuition he ever obtained. But his father, though he had not himself enjoyed the benefit of an early education, was devoted to the cultivation of his children, and sought by personal instruction to supply to them what he had not the means of deriving from seminaries of learning. He was a practical surveyor, adequately acquainted with the mathematics and astronomy, and familiarly conversant with history, poetry and general literature, of which he possessed most of the standard works in our language; and these were the means which, under his fostering attention, seconded by extraordinary facility in his pupil, and by a sweetness of temper which was his characteristic from birth, completed all the education the son received. It is the praise and the evidence of the native powers of his mind that, by domestic instruction and two years of grammatical and classical tuition obtained from other sources, Mr. Marshall wrought out in after life a comprehensive mass of learning, both useful and elegant, which accomplished him for every station that he filled; and he filled the highest of more than one description.

The war of the Revolution is known to have been in



preparation for some years before the first blow was struck. In all the colonies the topics of controversy were familiar to the youth, and in none more than in Virginia. The most temperate spirits in the land looked to arms as the inevitable recourse; and by their writings, their speeches, their daily and familiar conversation, spread the preparatory temper around them. It was the retired soldier of Mount Vernon, who in April, 1769, thus wrote to his friend George Mason, who afterwards drafted the first Constitution of Virginia: "At a time when our lordly masters in Great Britain will be satisfied with nothing less than a deprivation of American freedom, it seems highly necessary that something should be done to avert the stroke and maintain the liberty which we have derived from our ancestors. But the manner of doing it, *to answer the purpose effectually*, is the point in question. That no man should scruple or hesitate a moment to use arms in defense of so valuable a blessing is clearly my opinion."

This sentiment and others of the like strain, universally diffused, led to military training in many parts of the country. It was to furnish the only effectual answer to the purpose of oppression; and as the heart of John Marshall was from his birth riveted to the cause of freedom, he devoted himself from 1773, when he was in his eighteenth year, to acquire the elements of military knowledge in a volunteer corps, with a comparative disregard of the further pursuit of his civil education, and of the study of the law, which he had commenced.

The battle of Lexington, on the 19th of April, 1775, brought to a crisis the protracted efforts of the colonies to obtain the blessings of political liberty by appeals to justice and to the principles of the British Constitution.

At this date Mr. Marshall resided in the paternal mansion at Oak Hill, and his first appearance after intelligence of the event was as an officer of a militia company in Fauquier, which had been ordered to assemble about ten miles from his residence. A kinsman and contemporary, who was an eye-witness of this scene, has thus described it to me:

"It was in May, 1775. He was then a youth of nineteen. The muster field was some twenty miles distant

from the court-house, and in a section of country peopled by tillers of the earth. Rumors of the occurrences near Boston had circulated with the effect of alarm and agitation, but without the means of ascertaining the truth, for not a newspaper was printed nearer than Williamsburg, nor was one taken within the bounds of the militia company, though large. The captain had called the company together and was expected to attend, but did not. John Marshall had been appointed lieutenant to it. His father had formerly commanded it. Soon after Lieutenant Marshall's appearance on the ground, those who knew him clustered about him to greet him, others from curiosity and to hear the news.

"He proceeded to inform the company that the captain would not be there, and that he had been appointed lieutenant instead of a better—that he had come to meet them as fellow soldiers, who were likely to be called on to defend their country and their own rights and liberties invaded by the British—that there had been a battle at Lexington, in Massachusetts, between the British and Americans, in which the Americans were victorious, but that more fighting was expected—that soldiers were called for, and that it was time to brighten their fire-arms and learn to use them in the field—and that, if they would fall into a single line, he would show them the new manual exercise, for which purpose he had brought his gun—bringing it up to his shoulder. The sergeants put the men in line and their fugleman presented himself in front to the right. His figure, says his venerable kinsman, I have now before me. He was about six feet high, straight and rather slender, of dark complexion—showing little if any rosy red, yet good health, the outline of the face nearly a circle, and within that, eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature; an upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair of unusual thickness and strength—the features of the face were in harmony with this outline, and the temples fully developed. The result of this combination was interesting and very agreeable. The body and limbs indicated agility rather than strength, in which, however, he was by no means deficient. He wore

a purple or pale-blue hunting shirt, and trousers of the same material fringed with white. A round black hat, mounted with the bucks-tail for a cockade, crowned the figure and the man.

"He went through the manual exercise by word and motion deliberately pronounced and performed, in the presence of the company, before he required the men to imitate him; and then proceeded to exercise them, with the most perfect temper. Never did man possess a temper more happy, or, if otherwise, more subdued or better disciplined.

"After a few lessons the company were dismissed, and informed that if they wished to hear more about the war and would form a circle around him, he would tell them what he understood about it. The circle was formed and he addressed the company for something like an hour. I remember, for I was near him, that he spoke at the close of his speech of the Minute Battalion about to be raised, and said he was going into it and expected to be joined by many of his hearers. He then challenged an acquaintance to a game of quoits and they closed the day with foot-races and other athletic exercises, at which there was no betting. He had walked ten miles to the muster field, and returned the same distance on foot to his father's house at Oak Hill, where he arrived a little after sunset."

This is a portrait, my fellow-citizens, to which in simplicity, gaiety of heart and manliness of spirit, in everything but the symbols of the youthful soldier, and one or two of those lineaments which the hand of time, however gentle, changes and perhaps improves, he never lost his resemblance. All who knew him well, will recognize its truth to nature.

In the summer of 1775 he was appointed first lieutenant of a company in that Minute Battalion of which he had spoken — was ordered in the autumn of that year to the defense of the inhabitants adjacent to Norfolk, then menaced by a predatory force under Lord Dunmore, the Royal Governor of the colony; and on the 9th of December he had a part in the gallant and successful action at the Great Bridge, where Lord Dunmore attempted to arrest their further progress to Norfolk, but

was compelled by defeat to take refuge in his vessels, and to leave to the inhabitants the succor which had been sent them. Thus, at an age when the law regarded him as still in a state of pupillage to be defended by others, he was facing the fire of the enemy in the defense of his country.

In July, 1776, he was commissioned a lieutenant in the Eleventh Virginia Regiment in the continental service, with which he marched to the northward, where, in May, 1777, he was appointed a captain; and from this time till February, 1781, with the exception of a part of the year 1779-80, he was constantly at the post of danger, and had before the age of twenty-six given one-third of his life either to preparation for duty, or to the full and effective services of a patriot soldier.

The principal events of his military life have a peculiar interest for you, my fellow-citizens, since the protection or the rescue of this city from the grasp of the enemy was connected with most of them. His regiment belonged to the brigade of General Woodford, which formed part of the American right at the battle of Brandywine, in front of which was placed the Third Regiment, commanded by his gallant father.

On the 4th of October following, he was in the battle of Germantown, and in that part of the American Army which, after attacking the light infantry posted in front of the British right wing, and driving it from its ground, was detained while pursuing the flying enemy by the fire of the Fortieth British Regiment in Chew's house.

He was one of that body of men, never surpassed in the history of the world, who, unpaid, unclothed, unfed, tracked the snows of Valley Forge with the blood of their footsteps in the rigorous winter of 1778, and yet turned not their faces from their country in resentment nor from their enemies in fear.

He was again in battle at Monmouth on the 28th of June, 1778, upon the retreat of the British Army from this city to New York; and thus in the course of less than a year he was three times in battle under the Immortal Father of his Country, and twice, in the fields of Brandywine and Monmouth, with the heroic La Fayette. *Washington — La Fayette — Marshall* — what names now more



sacred to the lovers of constitutional freedom throughout this land! *Brandywine — Germantown — Monmouth* — what battles could have equaled the disaster of these, if their rolls had returned such names among the dead!

On the night of the 15th of June, 1779, he was in the covering party at the assault of Stony Point, and was subsequently an officer of the detachment ordered by Lord Sterling to cover the retreat of Major Lee, after his brilliant surprise and capture of the British garrison at Powles' Hook on the night of the 18th of August. He continued on the Hudson until the close of that year, when, not being in that part of the Virginia line which was ordered to South Carolina, and the enlistment of the rest of the Virginia troops having expired, he returned to his native State, and until October, 1780, prosecuted the study and took a license for the practice of the law.

In October, 1780, when the man who was the only stain upon the fidelity of the American army invaded the State of Virginia with a British force, Captain Marshall again joined the army under the command of Baron Steuben, and on the 10th of January, 1781, was with it near Hoods, when the British troops, on their retiring to Portsmouth, sustained, in an ambuscade by the Americans, the only loss which on their part attended that incursion. Before the renewed invasion of Virginia in the spring of 1781, there being more officers than the State of Virginia line required, he resigned his commission and in the succeeding autumn commenced the business of his profession.

And now, my fellow-citizens, if in the heat and conflict of political parties it sometimes happens, as happen it does, that the principles and motives of the best among us are calumniated by imputed disaffection to freedom, to republicanism and to the good of the people, what more triumphant refutation of the slander, if it were uttered against John Marshall, than to hold up this brief sketch of the first twenty-five years of his life! A man of the people, deriving his existence from a cultivator of the earth; a stranger during youth to all the indulgences which nourish a sense of superiority to others, or deaden a sympathy with the humble; imbibing his



knowledge, his tastes, his morality, his estimate of mankind, from a brave and virtuous yeoman; and at the age of nineteen seizing a sword from the armory of his country, and, without the thirst of military glory or the love of command, carrying it for six years unsheathed in the cause of equal rights! — Such a man, at the age of twenty-five, must have turned out his father's blood from his veins, and have dug up from the native soil of his heart every seed and plant of his youth, or he could have no choice but to live and to die a republican.

But a short time elapsed after Mr. Marshall's appearance at the bar of Virginia before he attracted the notice of the public. His placidity, moderation and calmness irresistibly won the esteem of men and invited them to intercourse with him; his benevolent heart and his serene and at times joyous temper made him the cherished companion of his friends; his candor and integrity attracted the confidence of the bar; and that extraordinary comprehension and grasp of mind, by which difficulties were seized and overcome without effort or parade, commanded the attention and respect of the courts of justice. This is the traditionary account of the first professional years of John Marshall. He accordingly rose rapidly to distinction, and to a distinction which nobody envied, because he seemed neither to wish it nor to be conscious of it himself.

He was chosen a representative to the Legislature, and then a member of the Executive Council, in the course of the year 1782; but after his marriage in January, 1783, with Mary Willis Ambler, a daughter of Jacqueline Ambler, of York, in Virginia, he was desirous of leaving public life, that he might devote himself more closely to his profession and to that domestic felicity which was promised by his union with a lady who for nearly fifty years enjoyed his unceasing affection and tenderness, and whom he describes in his will as a Sainted Spirit that had fled from the sufferings of life. He accordingly, in the year 1784, resigned his seat in the Executive Council; but, although he was an inhabitant of Richmond, his friends in Fauquier, who had known and loved him from his birth, and took a most natural pride in connecting his rising name with their county, spontaneously

elected him to the Legislature, and in the year 1787 he was chosen a representative to the same body for the city of Richmond.

A day had now approached when questions of momentous national concern were to display more extensively the powers of this eminent man, and to give to the whole American people an interest in his services and fame.

Whoever speaks of the confederation under which these States achieved their separation from Great Britain may safely do it in the language and with the feelings of the historian of Washington. "Like many other human institutions," he says, "it was productive neither in war nor in peace of all the benefits which its sanguine advocates had expected. Had peace been made before any agreement for a permanent union was formed, it is far from being improbable that the different parts might have fallen asunder, and a dismemberment have taken place. If the confederation really preserved the idea of union, until the good sense of the nation adopted a more efficient system, this service alone entitles that instrument to the respectful recollection of the American people, and its framers to their gratitude."<sup>1</sup> With this just testimonial to a merit sufficient of itself to consecrate it in the affections of the country, it must at the same time be conceded that the confederation was no more than the limited representative of other governments, and not a government itself. It was a league of Sovereigns but not a Sovereign; nor had its mandates the sanctions, nor consequently the efficacy, of a supreme law. With power to contract debts, and to pledge the public faith for their payment, it had no power to levy taxes or to impose duties for the redemption of the pledge. It was competent to declare war, but not to raise armies to carry it on. It was authorized to receive ambassadors and to make treaties, but not to regulate commerce, their most frequent and most salutary object. It stipulated for the free and equal trade and intercourse of the citizens of all the States, but was without judicial authority to decide upon the violation of the compact, or to declare the nullity of

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<sup>1</sup> 1 Marshall's *Life of Washington*, 429.

the violating law. It was in fine the organ of communication between the States and with foreign powers, and was intrusted in certain cases to declare their respective relations, and to assess the proportions in which the members of the confederacy were to discharge their common duty, but it could effectuate nothing until the separate consent and act of the States had supplied it with the means. Every case of non-compliance with the requisitions of Congress, and they were frequent and fearful, was consequently either a case of rupture and dissolution of the Union or of general paralysis. When the excitement of war had subsided, and a diversity of local interests had produced the inevitable birth of opposing wishes and opinions, "a government depending upon thirteen distinct sovereignties for the preservation of the public faith could not be rescued from ignominy and contempt but by finding those sovereignties administered by men exempt from the passions incident to human nature."<sup>1</sup>

The years of peace which immediately ensued this glorious war attested but too faithfully the entire inefficiency of this system for the maintenance of the character as well as of the interests of the American people. The debts of the nation were unpaid, even to "that illustrious and patriotic band of fellow-citizens whose blood and whose bravery had defended the liberties of their country."<sup>2</sup> The men whom we now seek for in every nook and corner of this extended land to clothe them with the mantle of unsparing bounty, in gratitude for the smallest contribution of military service, are the survivors of those who, having borne the burden of the whole war, were then suffered to perish in their rags for want of justice. Some of the stipulations of the treaty of peace with Great Britain were confessedly violated by us through the inability of Congress to enforce their performance by the States; and the nation from whom we had wrung our freedom, in a struggle not more illustrated by courage than by that virtue which justified the appeal "to the Supreme judge of the world for the rectitude of our intentions," could cite our defaults in

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<sup>1</sup>2 Marshall's *Life of Washington*, 75.

<sup>2</sup> Address of Congress to the States.

peace as the cause and excuse of her own. Public credit was annihilated, private engagements were disregarded; State laws, instead of correcting the evil, in many instances increased it, by relaxing the administration of justice: and the fruit of the whole was the prodigious birth of parties, in whose conflict the common mother that bore them was threatened with dishonor and death.

These parties, in both of which there were many who looked with agony upon the state of the country, and at the crisis which the unremedied mischiefs of the time must soon have brought on, were in all that regards our National Union, discriminated by a broad and never to be forgotten distinction. On the one side, regarding the people as one, by their common sufferings, triumphs and interests, and dreading the catastrophe which they feared was at hand, they labored to unite them in an indissoluble union, under one Federal head, having supreme power to regulate and govern the general concerns of the whole. On the other, regarding the States with partial affection, and jealous of every measure which tended to deprive them of any portion of the ultimate control, they magnified the danger, and decried the uses, and resisted the grant, of efficient powers, even to the confederation.

It is known on which side of this great question was the immortal father of his country. "I do not conceive," he said, in the year 1786, "that we can exist long as a nation, without lodging somewhere a power which will pervade the whole union in as energetic a manner as the authority of the State governments extends over the several States." Being called upon to use his personal influence to bring to order a body of insurgents whom the disordered state of the times permitted to grow into flagrant rebellion against the laws, he replied: "I know not where that influence is to be found, nor, if attainable, that it would be a proper remedy for these disorders. *Influence is not government.* Let us have a government by which our lives, liberties and properties will be secured, or let us know the worst at once." On the same side, then and ever after, was John Marshall; and when the extremity of public distress had wrung from twelve of the States their consent to a convention for a revision of the Federal system, and that body had submitted for the



approbation of the people of the several States the present Constitution, he was a delegate to the convention of Virginia which met on the 2d of June, 1788, to take it into consideration.

Virginia was divided with remarkable equality in regard to this instrument, for which there is now among us a profession of universal admiration; and she sent the flower of her people to the convention at which it was to be considered. Intelligence, talents, patriotism and undoubted integrity of purpose did not distinguish the parties in that body from each other; but they were irreconcilably opposed in opinion, and respectively assailed and defended the fundamental principles of the Constitution with the ardor of equal conviction. The fire of Patrick Henry kindled in many of his hearers the most vivid apprehensions for the fate of the States, and of freedom itself, under the influence of a Constitution in the first words of which, "We the people," he saw the portent of consolidation, and in the title and office of President "the likeness of a kingly crown." He alarmed them by the declaration that by the power of taxation, by that of raising an army, and by their control over the militia, Congress would have the sword in one hand and the purse in the other, "and that unless a miracle in human affairs interpose," the nation could not retain its liberty; that the treaty-making power would place the territory and commerce of the States in the hands of the President and two-thirds of a quorum of the Senate; and that by its power to make all laws which should be necessary and proper to carry its express powers into effect, "the government would operate like an ambuscade and would destroy the State governments, and swallow the liberties of the people without giving them previous notice." Other delegates of great name and influence, the Masons and the Graysons, men at that time and afterwards most dear to Virginia, assisted to rivet these fears upon the public mind by every variety of argument drawn from almost every provision in the Constitution, those especially to which there must be immediate resort in the very first steps of its administration.

Of the delegates who resisted these assaults, there were two whom subsequent events have distinguished from the



rest by their long continued and elevated career. James Madison, who had been a distinguished member of the convention which formed the Constitution, and had afterwards devoted his consummate powers, with Hamilton and Jay, to the explanation and defense of the whole instrument,— this now most venerable and venerated man, the beautiful evening of whose illustrious life is, to the delight of a grateful people, still unspent,— gave to it again the full vigor of his philosophical mind, and the copious resources of his mature and disciplined wisdom; and by the side stood the man we are assembled to honor, who turning from what was incidental or subordinate to the more important topics of debate, and shedding upon them the light of an intellect in whose rays nothing was obscure, dispelled the shadows which had been thrown around them, and in sustaining the Constitution unconsciously prepared for his own glory the imperishable connection which his name now has with its principles. Fortunately for him, as for us all, the convention of Virginia adopted the Constitution; but the small majority of ten by which it was carried, and this brief notice of the objections to it, may show that the seeds of party division were sown before the formation of the present Union, and that if the spirit of the confederation was not likely to misinterpret the administration of the Constitution it was as little likely to regard it with favor.

The sentiments of Mr. Marshall upon the best general structure of government, declared in this memorable convention, were those in which he afterwards lived and died. He was the friend of a government of sufficient strength to protect those rights in whose behalf government is instituted; but he was also, and therefore, the friend of the people, and of the principle of representation, by which rulers are kept in harmony with the people; and he gave his cordial preference to the scheme of regulated liberty, proposed in the Constitution, over every other form of government upon earth. In his first reply to Mr. Henry he said: "I conceive that the object of the discussion now before us is whether democracy or despotism be most eligible. Those who framed the system submitted to our investigation, and those who now support it, intend the establishment and security of the

former. The supporters of the Constitution claim the title of being firm friends of liberty and the rights of mankind. They consider it the best means of protecting liberty. We, sir, idolize democracy. Those who oppose it have bestowed eulogiums on monarchy. We prefer this system to any monarchy, because we are convinced that it has a greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well regulated democracy." "The honorable gentleman said that a government should depend upon the affections of the people. It must be so. It is the best support it can have." "We are threatened with the loss of our liberties by the possible abuse of power, notwithstanding the maxim that those who give may take away. It is the people that give power and can take it back. What shall restrain them? They are the masters who gave it and of whom their servants hold it." "The worthy member has concluded his observations by many eulogiums on the British Constitution. It matters not to us whether it be a wise one or not. I think that, for America at least, the government on your table is very much superior to it. I ask you, if your House of Representatives would be better than this, if the hundredth part of the people were to elect a majority of them? If your Senators were for life, would they be more agreeable to you? If your President were not accountable to you for his conduct,—if it were a constitutional maxim that he could do no wrong,—would you be safer than you are now? If you can answer *yes* to these questions, then adopt the British Constitution. If not, then, good as that government may be, this is better."

It was the admirable temper in which these remarks were made, and the spirit of sincerity and personal conviction which breathed in them, that drew from Patrick Henry his short but comprehensive eulogium: "I have the highest respect and veneration for the honorable gentleman. I have experienced his candor upon all occasions."

We are now, fellow-citizens, at the distance of nearly half a century from the first movements of the government established by the Constitution thus adopted, and it is not possible to give an intelligible narrative of the life

of John Marshall without a glance at them during the administration of the first President. The principal actors in them have passed away. Their conflicts of opinion,—their struggles for personal triumph or for public favor,—have ceased to divide or to excite us, while the memory of their talents and of their devotion to the public welfare is perpetually coming up to us with fresh and renewed fragrance, as our senses take in the scene of universal happiness which has crowned their labors. In referring to that day it is our duty and delight, not only to remember this, but especially that we are speaking of one whose heart was a fountain of good will to all, and who in the sharpest encounters of party was a stranger to every feeling that embitters or degrades it. No man of truth or candor ever imputed to him a motive that was false to his country. His venerable form would almost rise to the rebuke of one who should endeavor to heighten his praise by imputing such a motive to those who were his political opponents.

The friends of the constitution, with whom the name of John Marshall will ever stand the first and most illustrious, were classed before and after its adoption under the title of Federalists, from their preference and support of the Federal union which it was designed to create. During the administrations which ensued, the apprehension of its alleged tendency to overthrow the States, and to destroy American liberty, as it had not been entertained by them at any time, did not induce them to adopt a jealous construction of its powers. They acted upon the principle that it was their duty to give this instrument a fair interpretation, and fairly to exercise its powers in furtherance of its declared design, “to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” As the sovereign people of the States had substituted the Constitution for the confederation, they believed that it consisted as little with their engagement of fidelity as with the general welfare to make it a confederation in effect, either by the rules by which it was expounded, or by the spirit in which it was administered. They regarded the States as strong by the

ten thousand bonds of property and local association, and by the great basis of internal power which had been reserved to them by the people. The Union they considered as destined to contempt and speedy extinction, unless the powers given to it should be used in the spirit of the gift, to make it in its own sphere what the States were in theirs. It was a time, however, when to practice upon these principles, now almost universally professed, was to encounter the fears and honest prejudices of a large portion of the people, to a greater degree than we may at present be aware of. The people had been reared at the bosom of their respective States, with little experience of any but domestic authority, except that which was really foreign, and at the same time hostile; and they were not unsusceptible of alarm from preparations for a government which in some aspects appeared to be external, though it was truly and essentially an emanation from themselves. The system was untried. What it certainly would be, was not known. What it might prove to be, was sincerely feared. The exercise of power under political constitutions of very different character, being in many instances discriminated in degree rather than in kind, its application in the mildest form becoming despotic if pressed to an extreme, it was not difficult, in the obscure light of our just dawning Government, to raise to an excited imagination a phantom of terrific threatenings, from the first acts of power, however mild and benign.

In this state of the public mind, the first office under the Constitution was held by Washington, to whom, if to any man upon earth, universal confidence was due for the qualities material to the prosperous issue of the new Government. Nevertheless, his incomparable moderation, his self-abandonment upon all occasions in furtherance of the public weal, his repeated rejection of power, trust and emolument, his known reluctance to accept the station, even at the unanimous call of his country, none of these could relieve his administration from the fears which the Constitution had engendered.

The funding of the debts of the Union, and the assumption of the State debts contracted in the war — a proposed duty upon distilled spirits — the establishment



of a National bank — an increase of the army to protect the western frontier from Indian aggression — and an enlargement of the duties on impost and tonnage, with a view to a permanent provision for the discharge of the public debt, instead of leaving it to annual appropriations, were the principal transactions which marked the first official term of the first President of the Union; and we may ponder them as constituting an instructive chapter in the history of the human mind, when acts like these could, before the year 1793, organize this Nation into parties who continued their struggle till the authors of this legislation ceased as a party to exist, and the fear of their prevailing policy ceased to exist with them.

It can excite no surprise in those who are familiar with that day, that in the intermediate period between the proclamation of neutrality in 1793 and the ratification of the British treaty in 1795, an endeavor to provide an armament of six frigates for naval protection had to contend with the same apprehension of Federal power; and that it was necessary to palliate this first effort towards the foundation of our immortal navy with a clause which suspended further proceedings if peace should take place with the regency of Algiers. It should allay the bitterness of parties that are, and are to come, to cast their eyes back to the still visible distance of our first administration, and to see how little of that which once divided the country now remains to discriminate us.

No State in the Union took an earlier or more decided lead upon the questions supposed to affect the power of the States than Virginia. Her talents, her love of liberty, her love of fame,

the spur that the clear spirit doth raise,  
(That last infirmity of noble mind.)

continued to make her voice earnest, clear and determined in asserting the dangers of the Federal administration, as it had been in opposing the Constitution. At the first meeting of the State Legislature after it had been adopted, the political sentiments of that body were such as to send the opponents of the Constitution to the Senate of the United States, in exclusion of Mr. Madison; and they adopted, by a majority of two to one, resolutions



enjoining Congress to call a convention for proposing amendments to it, to the effect, if successful, of throwing again open the whole subject of union.

Of this legislative body Mr. Marshall was a member, representing the city of Richmond, as he continued to do until the spring of 1791.

He had attained a high professional reputation, offering everything that great learning, extraordinary vigor of mind and the purest integrity can place within the reach of an eminent lawyer. He was a favorite with the people of Virginia; and in a professional career undisturbed by political connection, there was nothing to obstruct his progress to universal regard and preference. But although no man, from the gentleness of his nature and the perfect balance of his mind and affections, could be freer from party excitement than he was, the success of the new government was near to his heart. He had labored strenuously to endue it with the powers it possessed. He had studied its principles with as little disturbance from passion or prejudice as our nature permits, and thoroughly approved them. He was moreover devotedly and by hereditary regard attached to the man to whom the people had confided the exalted trust of first administering the Constitution, knew and appreciated his wisdom, his moderation, the equipoise of his passions, his exemptions from the strain of selfish ambition, his fear of God and his love of country. The united influence of these causes, together with the urgent instances of his friends, compelled him at the outset of the government to disregard personal inconvenience in coming to its support; and accordingly for successive years, on the theater of his native State, where the sincerest admiration of Washington did not prevent nor scarcely mitigate the freest strictures upon his administration, Mr. Marshall gave the full powers of his intellect to the explanation and defense of its measures.

He was perhaps the fittest of his contemporaries for the performance of this office. It was impossible to charge his life with a reproach. If a measure was condemned for its tendency to produce corruption, from whom could its defense come with more effect than from one who was known to be incorruptible? If it was assailed for

perniciously increasing the lustre or the influence of office, who could confront the charge with more grace than one whose simplicity rejected all the artifices by which weakness is disguised or strength made more imposing to the prejudices of men? If it was denounced as a dangerous excess of power, whose denial could be more accredited than that of a lover and defender of freedom from his youth, and one who in his intercourse with the world disclaimed the distinction and authority even of his own talents? And above all, if the objection challenged the act as an usurpation upon the Constitution, who was there then, and who has there been since, that could surpass or in all respects equal him in touching the springs by which the inmost sense of the instrument is unlocked and displayed to view? The application of his powers in this cause was an admirable exercise for himself, enlarging and fortifying his mind for the great duties he was destined to perform. It preserved the warmth of his heart and the genial flow of his affections towards his country and its institutions, and if success and conviction did not follow his exertions they did not inflame opposition nor provoke resentments. His manner of debating then and ever after in representative bodies was as grave as truth and reason could make it. He trusted to these alone for effect. He resorted to none of those arts of oratory which so often disturb their influence; and if he failed to win over his opponents he did not alienate their respect and good will.

He declined a re-election in 1792, and from this time until 1795 continued in the practice of his profession.

In the last of these years the country was agitated to a degree transcending all former experience by the ratification of the treaty with Great Britain. Scarcely any public measure which in the sequel has done so much good and so little injury to the Nation has been in the outset the occasion of more general and intense dissatisfaction. While the Constitution was in the hands of the people for rejection or adoption, the power by treaty to regulate our relations with the world, and to affect the commerce of the country with the obligatory force of a supreme law, without the intervention of Congress, was an undisputed construction of its language, and was re-

garded in some of the conventions as one of its most dangerous provisions. In the excitement occasioned by the treaty with Great Britain, this construction was rejected. The authority of Congress to regulate commerce was inferred to be exclusive from the general grant of the power to that department, or to imply a final control over a treaty having this aspect; and even the pledge of the public faith for the execution of a treaty was asserted to be incomplete while Congress withheld the appropriations which it made necessary. We may perceive in our existing relations with a foreign government how remarkably the opinions of the people upon this point have in the course of forty years converged to unanimity! The question was then new and of infinite moment. It was the first great occasion for discussing the limits of the treaty-making power, for it was the first treaty upon which a large portion of the people, with whom the representative branch was likely to sympathize, had differed from the executive; and it was a crisis moreover in which war with England, or discord equivalent to war with France, was the apparent alternative of a decision either way.

It was at this time that Mr. Marshall again held a seat in the Legislature of Virginia, to which the sagacity of his friends had elected him against his consent. The Senators of Virginia had refused to concur in the ratification of the treaty. An opinion of great influence was afterwards expressed in that State, impeaching the treaty as one in which "the rights, the interest, the honor, and the faith of the Nation were grossly sacrificed." It was here of course that the constitutional defect, as well as every other objection that could encourage the House of Representatives to defeat the treaty by refusing the appropriations, was urged with all the ardor of excited feelings, and with the energy of sincere belief. But upon a question of constitutional law, no feelings and no conviction that were not in harmony with the truth could resist the powers of John Marshall. The memory of the surviving witnesses of his memorable effort upon that occasion is believed to be the only record of it which exists. It is remembered as an admirable display of the finest powers of reasoning, accompanied with an

exhibition of the fullest knowledge and comprehension of the history and scope of the Constitution, and of the public interests affected by the treaty; and its effect will forever be seen in the resolution which the House adopted. It did not touch the constitutional objection in any of its forms, nor directly question the expediency of the treaty; but it expressed the highest sense of the integrity, patriotism and wisdom of the President of the United States, and declared that in approving the votes of the Senators of that State relative to the treaty, the assembly did in no wise mean to censure the motives which influenced him to the ratification.

This period of the life of Chief Justice Marshall, taken in connection with that which preceded, and contemplated in reference to what finally proved to be his great duty and the crown of his public services, cannot be regarded without emotion by any one who acknowledges a Providence in the affairs of men.

The day was to come, and was not distant, when laws enacted by the representatives of a free and sovereign people were to be submitted to a comparison with the Constitution of the Nation, and to stand or fall by the decrees of a court destitute of the smallest portion of political power, and having no independent authority but that of reason. The passions of the people, the interests of the States, and the power of both, were to be controlled and overruled in this name; or if it should be despised and rejected, the only bond of the Union that would remain was to be that which alone remains to nations after reason and law have departed from the earth.

The mind of man cannot conceive of a finer contrivance than the judicial power of the Union to give regularity and harmony to a system, the parts of which acknowledge independent laws and gravitate as it were towards different suns, while the whole move in one common orbit, and are bound to obey a central attraction for the maintenance of internal order and of their relations to the external world. But the essence of this attraction is reason rather than force, and the great fountain which supplies it is in this supreme and central court; and we might tremble to ask, where would the



greater disturbances of the system look for their corrective, if the supply of this celestial influence should fail, if her bosom should cease to be the seat of the law, and her voice the harmony of the Union.

For the first of the offices in this august court, what virtues then, what intellectual powers, what training could have more the cast of apparent destination than those of this eminent man? To the eye of the world, his connection with the war, with the confederacy, with the adoption of the Constitution, with the conflicts of opinion it excited, and the contests which its first operations produced, may have appeared casual. His consent to serve in legislative assemblies was often reluctant and sometimes withheld. Office, power, and public honors he never sought. They sought him, and never found him prepared to welcome them except as a sense of duty commanded. The last thing to which his eye was directed was probably the office which he finally held. But we can now look back and see with certainty that it was this very combination of patriot, soldier, lawyer and statesman, and strenuous defender and expounder of the Constitution, united with his republican simplicity of manners, the amenity of his temper, and his total exemption from that stain by which the angels fell, that was filling the measure of his accomplishments for it and preparing the whole country to acknowledge that no one could fill it so well.

After the argument upon the British treaty, which made him universally known, Mr. Marshall was regarded as belonging to the Nation. The President offered to his acceptance the office of Attorney-General of the United States, which he felt himself at liberty to decline. Upon the recall of Mr. Monroe from France in the year 1796, he was invited to take the appointment of minister to that nation, but he again declined. He continued in the legislature of Virginia, and prosecuted his profession with assiduity and still increasing reputation. It was in this year, and at the bar of the Supreme Court of the United States, in this city, that he justified his professional fame by his argument in the great cause of the Virginia debts. In the following year, when under peculiar circumstances it was deemed proper to make a last



effort to avert hostilities with France by a special mission, his sense of patriotic duty overcame his reluctance, and he accepted the appointment offered to him, in conjunction with General Pinckney and Mr. Gerry, by Mr. Adams, then President of the United States.

No man in the nation was fitter for the office by firmness, by moderation, by true American spirit, extensive knowledge of political events, and thorough competency to justify the course of Washington's administration towards France. It was at the same time a post of great difficulty and responsibility. From the first outbreaking of that revolution which he has described as "the admiration, the wonder, and the terror of the civilized world," the gratitude of this people for aid in the revolutionary war, and their sympathy with the cause of freedom, gave them the strongest interest in the establishment of a free government in France. They felt it universally, and they expressed it in every form that grateful hearts could suggest. The affection was deep, sincere and enthusiastic. The first excesses of the revolution did not arrest, nor to any great degree abate, the force of this generous current. They were attributed to the strength of the bondage by which the people of France had been chained to the earth, and which nothing but convulsions could shatter to pieces. But as from day to day they became more frightful in that career which was to cover France with blood and horror, many of her sincerest friends more than doubted whether these were the lineaments of true liberty, and whether it was the duty of gratitude to admire and to praise them. Upon this point, and possibly because we were so upon others, we became a divided people; and when the declaration of war by France against Great Britain made it her interest as it was her undisguised purpose to draw us into an alliance with her, it required all the firmness and personal influence of that immortal man who was then at the head of our government to hold our nation to the safe and middle path of neutrality. Our treaty with Great Britain increased the division among ourselves, aggravated the complaints of France, and at length led to a scene of unparalleled outrage upon our property, our peace and our independence. Pursuing that policy which from the

outset marked her course towards those who either opposed or stood aloof from her, France openly attempted to separate this people from those whom they had selected to administer their government. In November, 1796, the French minister to this country, in announcing to the Secretary of State, by order of the Directory, the suspension of his functions, concluded his letter by an inflammatory apostrophe to the American people, calling upon them to remember that this government had made a treaty of amity with the tyrant of the seas, who had declared a war of death to the French nation for having cemented with its blood the independence of the United States. "Let your Government return to itself," was its concluding sentence, "and you will find in Frenchmen faithful and generous allies."

In the same spirit the Directory refused to receive General Pinckney, the minister appointed to succeed Mr. Monroe, and compelled him to leave the territories of the Republic; and its President, in his formal address at the audience of leave given to Mr. Monroe, declared that France would not "degrade herself by calculating the consequences of the condescendence of the American Government to the suggestions of her former tyrants;" but the American Minister was requested to assure the "good American people that, like them, France adored liberty, that *they* would always have her esteem, and they would find in the French people that republican generosity which knows how to grant peace, as it does to cause its sovereignty to be respected."

What, my fellow-citizens, would be the effect of an appeal in the same spirit to the American people at the present hour? What would be the response at this day to such an invasion of American independence? One universal cry of disdain and defiance from the farthest extremity of Maine to the Gulf of Mexico. In party divisions still continuing, and never to cease, the inseparable attendant of all the free States that have ever existed, the mingled good and evil of the best governments that man has ever formed, we strive for the power to order and appoint our own house as we deem best; but the very struggle has bound us the more to our country, and would indignantly throw off from the contest the

intrusion of aliens as an imputation and stain upon our filial love.

It was at a special session of Congress, convened upon the receipt of the dispatches of General Pinckney, that the President of the United States, on the 31st May, 1797, nominated that gentleman, together with Francis Dana, Chief Justice of the State of Massachusetts, and General John Marshall, to be Ministers to the French Republic. Mr. Gerry was subsequently nominated upon Mr. Dana's declining to accept the appointment. In the message to the Senate which made this nomination, the President stated that in the then critical and singular circumstances it was of great importance to engage the confidence of the great portions of the Union in the character of the persons employed and the measures which ought to be adopted; and he had therefore thought it expedient to nominate persons of talents and integrity, long known and intrusted in the three great divisions of the Union; and in his message to the House of Representatives, with a spirit and fearlessness in the cause of his country, in which Mr. Adams was second to no man that ever lived, he said, "such attempts to separate the people from their Government, to persuade them that they had different affections, principles and interests from those of their fellow-citizens, whom they had themselves chosen to manage their common concerns, and thus to produce divisions fatal to our peace, ought to be repelled with a decision which should convince France and the world that we were not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of honor, character and interest." Immortal sentiments, worthy of a founder of the Republic, and worthy to unite with the blood of her own citizens, in cementing her independence!

It was reserved for such a revolution as that of France to add the page to history which records the course and termination of this celebrated mission. The ministers were surrounded in Paris by the apparatus of a revolutionary power, the terrors of which were only alleviated by comparison with some of its preceding forms. They were unaccredited, unrespected, unprotected, and were

daily suffering in their persons both contumely and insult. They were assailed informally, but at the undoubted instigation of the minister of foreign affairs, with the flagitious demand of money for official use and distribution, as the conditional price of the liberty to negotiate for an adjustment of differences; and they were menaced, if they should refuse to pay the bribe, that their party in their own country would and should renounce them as corrupted by British influence to rapture the negotiation.

Nothing, however, could shake the constant minds of the American ministers. No unworthy fear could make them abate one jot or tittle of their whole duty to their country. They silenced the panders to this infamous venality with the answer of "no, no, not a sixpence:" and though denied the privilege of negotiation, they gained the whole merit, and perhaps more than the whole benefit of it, by forcing upon the ministers of foreign affairs before they received their passports, a defense of their country, and a bill of accusations against France, so full, so clear, so profound in its arguments, and withal so dignified and moderate in its tone, so truly and thoroughly American in its whole spirit, that it did not admit of refutation, nor of any limitation or qualification of praise.

The letters of the 17th of January and 3d of April, 1798, to Talleyrand, the minister of foreign relations, will reward perusal at all times as admirable specimens of diplomacy. They have always been attributed to the pen of Mr. Marshall. They bear internal marks of it. We have since become familiar with his simple and masculine style,—his direct, connected and demonstrative reasoning,—the infrequency of his resort to illustrations, and the pertinency and truth of the few which he uses—the absence of all violent assertion—the impersonal form of his positions, and especially with the candor as much the character of the man as of his writings, with which he allows to the opposing argument its fair strength, without attempting to elude it, or escape from it by a subtlety. Every line that he has written bears the stamp of sincerity; and if his arguments fail to produce conviction, they never raise a doubt, nor the shadow of a doubt, that they proceed from it.



The impression made by the dispatches of the American ministers was immediate and extensive. Mr. Marshall arrived in New York on the 17th of June, 1798. His entrance into this city on the 19th had the eclat of a triumph. The military corps escorted him from Frankfort to the city, where the citizens crowded his lodgings to testify their veneration and gratitude. Public addresses were made to him breathing sentiments of the liveliest affection and respect. A public dinner was given to him by members of both Houses of Congress, "as an evidence of affection for his person, and of their grateful approbation of the patriotic firmness with which he sustained the dignity of his country during his important mission;" and the country at large responded with one voice to the sentiment pronounced at this celebration, "Millions for defense, but not a cent for tribute."

Mr. Marshall immediately after this returned to Virginia and renewed his professional practice, with a determination to be no further connected with political life; and nothing perhaps would have shaken his purpose but an appeal which no determination could resist. We are indebted for the fact to a memoir of the Chief Justice which claims to have derived it from an authentic source.<sup>1</sup> General Washington, who had been appointed to the command of the armies raised by Congress for the expected hostilities with France, and who was afflicted by the spectacle of parties which still continued to cloud the country, invited Mr. Marshall to visit him at Mount Vernon. He there explained to him his views of the perilous crisis, pressed upon him with peculiar solemnity the duty which such men upon such occasions owe to their country in disregard of their private interests, and urged him to become a candidate for Congress. The more than sufficient motives for this request were doubtless the commanding talents of Mr. Marshall, his familiarity with every branch of our foreign relations, the high reputation which he had acquired in the recent mission, and especially the rare union of gentleness and firmness for which he was universally known, and which made him as incapable of party excess as he was of retreating be-

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<sup>1</sup> National Gallery of Portraits, Part III.



fore party opposition. But his reluctance was great, and he yielded it only to wishes which upon a question of patriotic duty had the authority of law. He accordingly became a candidate, and was elected in the spring of 1799.

It was a rare fortune, and the highest possible praise, to be thought worthy of this solicitation by that extraordinary person, who was surpassed by no one in his judgment of men, or in his love of virtue or of country; and it was a striking vicissitude which, as the first act of Mr. Marshall in the succeeding Congress, imposed upon him the afflictive duty of announcing on the 18th of December the death of "the hero, the patriot, and the sage of America." Those who were present on the occasion can never forget the suppressed voice and deep emotion with which he introduced the subject on the following day; or the thrill which pervaded the House at the concluding resolution, which ascribed to Washington the transcendent praise and merit of being "first in war, first in peace, and first in the hearts of his countrymen." The biographer of Washington attributes to General Lee of Virginia the merit of this inimitable description, and modestly withholds the name of the member whose introductory remarks were in all respects worthy of such a termination.

The House of Representatives in which Mr. Marshall had a seat was perhaps never exceeded in the number of its accomplished debaters, or in the spirit with which they contended for the prize of public approbation. It was the last which convened in this city, and furnished a continual banquet to such as had the taste to relish the encounter of minds of the first order, stimulated to their highest efforts, and sustained by the mutual consciousness of patriotic motives. The course of this eminent man, as a member of it, was such as all impartial persons must review without a censure. His principles of government were fixed, his confidence in the administration was great, his apprehension of public mischief from a radical change of its measures was sincere, and he neither deviated from the path which these sentiments prescribed, nor faltered in it. But there was that about him which defended him from the assaults of party and raised him above its suspicions. If he was a party man, he was so

by position, and not from temper or partial views. The homage which is paid to sincerity, even by those who do not practice it, was uniformly accorded to him; and the self-balanced mind which appeared in all he said and did was an admitted proof that he drew from his own convictions, even that which went to sustain the efforts and to augment the resources of party.

In a certain description of cases, those of which the law or the Constitution formed the main part, he was confessedly the first man in the House. When he discussed them, he exhausted them; nothing more remained to be said, and the impression of his argument effaced that of every one else. Of this class was the resolution of Mr. Livingston impeaching an order of the Executive, under a clause of the treaty with Great Britain, to surrender the person of Jonathan Robbins upon a charge of murder committed on board a British frigate. It was a question involving many of the greatest subjects that can be presented for debate, the construction of the treaty, the principles of the law of nations, the constitutional powers of the Executive, and those also of the Judicial Department. Upon such topics, however dark to others, his mind could by its own clear light

sit in the centre and enjoy bright day.

The speech which he delivered upon this question is believed to be the only one that he ever revised, and it was worthy of the care. It has all the merits, and nearly all the weight, of judicial sentence. It is throughout inspired by the purest reason and the most copious and accurate learning. It separates the executive from the judicial power by a line so distinct and a discrimination so wise that all can perceive and approve it. It demonstrated that the surrender was an act of political power which belonged to the Executive; and by excluding all such power from the grant of the Constitution to the judiciary, it prepared a pillow of repose for that department, where the success of the opposite argument would have planted thorns.

It has been said that his course in Congress was governed by his own convictions of right. No act of Congress during that administration was more thoroughly

associated with party than one of the previous session, commonly known, from its second section, by the name of the *Sedition Law*. He had not voted for it. He was not in Congress at the time of its enactment; but he voted for the repeal of the obnoxious section. Upon the introduction of a resolution to that effect, the journal of the House records his vote in the affirmative, while the names of all those with whom he generally concurred are to be found on the other side.

There were measures of a different description which he promoted with the fondest zeal and in conformity with the nearly universal wishes of the country. His personal veneration for Washington was the fruit of long observation and intercourse. It heightened his sense of the immeasurable debt which in common with all he believed was due to the father of his country; and not satisfied with that cheap discharge of it which is found in the cold apothegm, "that the best monument of a patriot and hero is in the bosoms of his countrymen," he deemed it the sacred duty of Congress to erect one which should represent to the senses the kindred image of the heart, and point the world and posterity to all that was mortal of the founder of the Republic. He submitted the resolution which invited the people to an universal commemoration of their grief for his death on the anniversary of Washington's birth. He submitted that also which asked and obtained for the Nation the precious deposit of his remains; and he reported the bill which passed the House of Representatives for erecting a mausoleum in the city of Washington; but the Senate postponed it to the next session, and he had then ceased to be a Representative in Congress.

His connection with the House of Representatives was terminated by his appointment at the close of the session as Secretary of War. He was soon after appointed Secretary of State, and continued in this office the remainder of the year.

Although he held the latter office but a few months, the Department contains the proof of his great abilities and patriotic spirit. It was his duty to correspond with the American Minister in England, upon the interrupted execution of the sixth article of the British treaty, in re-

gard to compensation to British creditors, and upon the question of contraband, blockade and impressment, which threatened to destroy the peace of the two countries; and it is impossible to imagine a finer spirit, more fearless, more dignified, more conciliatory, or more true to his country, than animates his instructions to Mr. King. Our relations with England were now supposed to be in danger from a pending negotiation with France, and thus in some respects the language which he held to France in 1798 became necessary towards England. It was adopted without hesitation. "The United States," he said, "do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with the one or the other of those powers, but they are ready to make amicable and reasonable explanations with either. The aggressions sometimes of one and sometimes of another belligerent power have forced us to contemplate and prepare for war as a probable event. We have repelled, and we will continue to repel, injuries not doubtful in their nature, and hostilities not to be misunderstood. But this is a situation of necessity, not of choice. It is one in which we are placed not by our own acts, but by the acts of others, and which we change as soon as the conduct of others will permit us to change it." This is the spirit, this is the temper, that gives dignity and security to peace, and carries into war the hearts of an united people! His dispatch of the 20th of September, 1800, is a noble specimen of the first order of state papers, and shows the most finished adaptation of parts for the station of an American Secretary of State.

I have now, my fellow-citizens, defectively traced the life of this eminent man to the age of forty-five; and you have seen him from his youth upward, engaged in various stations and offices, tending successively to corroborate his health, to expand his affections, to develop his mind, to enrich it with the stores of legal science, to familiarize him with public affairs and with the principles of the Constitution, and before little more than half his life had run out producing from the materials supplied by a most bountiful nature a consummate work, pre-eminently fitted for the judicial depart-



ment of the Federal Government. To the first office of this department he was appointed on the 31st of January, 1801.

At the date of this appointment the Constitution had been more frequently discussed in deliberative assemblies than in the Supreme Court of the United States. Circumstances had not yet called for the intervention of that court upon questions opening the whole scheme of the Constitution, and thereby determining the rules for its interpretation; nor had anything of previous occurrence established the meaning of some of the most important provisions which restrain the powers of the States. The Constitution is undoubtedly clear in most of its clauses. In all its parts it is perhaps as free from doubt or obscurity as the general language of a Constitution permits. But a Constitution has necessarily some complication in its structure, and language itself is not a finished work. The Constitution of the United States has been truly called an enumeration of powers, and not a definition of them. It cannot, therefore, surprise us, nor does it take from its merit, that the language of the Constitution required interpretation. It is true of the time when this appointment was made that in many parts of the greatest difficulty and delicacy it had not then received a judicial interpretation.

It was obvious, moreover, at that time that the rapidly augmenting transactions and legislation of the States, and their increasing numbers also, must, within the compass of a few years, present cases of interference between the laws of the States and the Constitution, and bring up for discussion those embarrassing questions from which the earlier days of the Union had been exempt.

For the duty of leading the highest court in the country in the adjudication of questions of such magnitude, as well as of controversies determinable by the laws of all the States, and by the code of public law, including a range of inquiries exceeding that of any other judicial tribunal that is known to us, was this illustrious person set apart; and when we now look back upon the thirty-four years of unimpaired vigor that he gave to the work, the extent to which the court has explained the Constitution and sustained its supremacy, the principles of inter-



pretation it has established for the decision of future controversy, and the confirmation it has given to all the blessings of life, by asserting and upholding the majesty of the law, we are lost in admiration of the man, and in gratitude to Heaven for his beneficent life.

Rare indeed were the qualifications which he brought to the station, and which continued to be more and more developed the longer he held it.

He was endued by nature with a patience that was never surpassed; — patience to hear that which he knew already, that which he disapproved, that which questioned himself. When he ceased to hear it was not because his patience was exhausted, but because it ceased to be a virtue.

His carriage in the discharge of his judicial business was faultless. Whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference, and the courtesy of his general manner was only so far restrained on the bench as was necessary for the dignity of office and for the suppression of familiarity.

His industry and powers of labor, when contemplated in connection with his social temper, show a facility that does not generally belong to parts of such strength. There remain behind him nearly thirty volumes of copiously reasoned decisions, greater in difficulty and labor than probably have been made in any other court during the life of a single judge! yet he participated in them all, and in those of greatest difficulty his pen has most frequently drawn up the judgment; and in the midst of his judicial duties he composed and published in the year 1804 a copious biography of Washington, surpassing in authenticity and minute accuracy any public history with which we are acquainted. He found time also to revise it and to publish a second edition, separating the History of the American Colonies from the biography, and to prepare with his own pen an edition of the latter for the use of schools. Every part of it is marked with the scrupulous veracity of a judicial exposition; and it shows, moreover, how deeply the writer was imbued with that spirit which will live after all the compositions of men shall

be forgotten,— the spirit of charity, which could indite a history of the Revolution and of parties in which he was a conspicuous actor, without discoloring his pages with the slightest infusion of gall. It could not be written with more candor an hundred years hence. It has not been challenged for the want of it but in a single instance, and that has been refuted by himself with irresistible force of argument as well as with unexhausted benignity of temper.

To qualities such as these he joined an immovable firmness befitting the office of presiding judge in the highest tribunal of the country. It was not the result of excited feeling, and consequently never rose or fell with the emotions of the day. It was the constitution of his nature, and sprung from the composure of a mind undisturbed by doubt, and of a heart unsusceptible of fear. He thought not of the fleeting judgments and commentaries of men; and although he was not indifferent to their approbation, it was not the compass by which he was directed, nor the haven in which he looked for safety.

His learning<sup>g</sup> was great, and his faculty of applying it of the very first order.

But it is not by these qualities that he is so much distinguished from the judges of his time. In learning and industry, in patience, firmness, and fidelity, he has had his equals. But there is no judge, living or dead, whose claims are disparaged by assigning the first place in the department of constitutional law to Chief Justice Marshall.

He looked through the Constitution with the glance of intuition. He had been with it at its creation, and had been in communion with it from that hour. As the fundamental law, instituted by the people, for the concerns of a rising nation, he revolted at the theory that seeks for possible meanings of its language that will leave it the smallest possible power. Both his judgment and affections bound him to it as a government supreme in its delegated powers, and supreme in the authority to expound and enforce them, proceeding from the people, designed for their welfare, accountable to them, possessing their confidence, representing their sovereignty, and no more

to be restrained in the spirit of jealousy, within less than the fair dimensions of its authority, than to be extended beyond them in the spirit of usurpation. These were his constitutional principles, and he interpreted the Constitution by their light. If it is said that they are the same which he held as a follower of Washington, a member of the Legislature of Virginia, and of the Congress of the United States, when party divided the country, it is most true. He was sincere, constant, and consistent from the beginning to the end of his life. If to others it appeared that his principles were meant for party, he knew that they were devoted to the whole people, and he received his earthly reward in their ultimate general adoption, as the only security of the Union and of the public welfare.

To these principles he joined the most admirable powers of reasoning. When he came to his high office, hardly any interpretation of the Constitution could be assumed as true by force of authority. The Constitution is not a subject upon which mere authority is likely at any time to sustain a judicial construction with general consent. Reason is the great authority upon constitutional questions, and the faculty of reasoning is the only instrument by which it can be exercised. In him it was perfect, and its work was perfect,—in simplicity, perspicuity, connection, and strength. It is commonly as direct as possible, rarely resorting to analogy, and never making it the basis or principal support of the argument. Of all descriptions of reasoning, this when sound is most authoritative, and such therefore are the judgments upon the Constitution to which it has been applied.

This is not the place for a particular reference to these judgments. During the time that he has been upon the bench, the court have explored almost every question in regard to the Constitution that can assume a judicial form. The obligation of contracts, and that which constitutes its essence,—the restraint upon the issue of paper currency by the States,—the authority of Congress to regulate trade, navigation, and intercourse among the States,—those principles and provisions in the Constitution which were intended to secure the rights of property in each of the States, and their enjoyment by intercourse among them all,—have been investigated, and settled

upon a basis not to be shaken so long as the law shall retain any portion of our regard.

If I were to select any in particular from the mass of its judgments, for the purpose of showing what we derive from the Constitution, and from the noble faculties which have been applied to its interpretation, it would be that in which the protection of chartered rights has been deduced from its provisions. The case of Dartmouth College is the bulwark of our incorporated institutions for public education, and of those chartered endowments for diffusive public charity which are not only the ornaments but among the strongest defenses of a nation. It raises them above the reach of party and occasional prejudice, and gives assurance to the hope that the men who now live may be associated with the men who are to live hereafter, by works consecrated to exalt and refine the people, and destined if they endure, to unite successive generations by the elevating sentiment of high national character.

In a thousand ways the decisions of this court have given stability to the Union by showing its inseparable connection with the security and happiness of the people of the United States.

While we think with just affection, my fellow-citizens, of that State at whose bosom we have been nurtured, whose soil contains the bones of our fathers and is to receive our own, and reverence her for those institutions and laws by which life is ennobled and its enjoyments enlarged, far from us be that purblind vision which can see nothing of our country beyond the narrow circle in which we stand. The Union is our country. The government of the Union is our own. It breathes our breath. Our blood flows in its veins. It is animated with the spirit and it speaks the voice of the whole people. We have made it the depository of a part of that liberty with which the valor of the Revolution made us free, and we can never review the works of this illustrious tribunal, since Chief Justice Marshall has been at its head, without gratitude to Heaven that it is the guardian of that part which alone could enable us in our separate communities to destroy the value of the rest.



What were the States before the Union? The hope of their enemies, the fear of their friends, and arrested only by the Constitution from becoming the shame of the world. To what will they return when the Union shall be dissolved? To no better than that from which the Constitution saved them, and probably to much worse. They will return to it with vastly augmented power, and lust of domination, in some of the States, and irremediable disparity in others, leading to aggression, to war, and to conquest. They will return to it, not as strangers who have never been allied, but as brethren alienated, embittered, inflamed and irreconcilably hostile. In brief time their hands may be red with each other's blood, and horror and shame together may then bury liberty in the same grave with the Constitution. The dissolution of the Union will not remedy a single evil, and may cause ten thousand. It is the highest imprudence to threaten it,—it is madness to intend it. If the Union we have cannot endure, the dream of the revolution is over, and we must wake to the certainty that a truly free government is too good for mankind.

The decisions of the Supreme Court of the United States have raised the renown of the country not less than they have confirmed the Constitution. In all parts of the world its judgments are spoken of with respect. Its adjudications of prize law are a code for all future time. Upon commercial law it has brought us nearly to one system, befitting the probity and interests of a great commercial nation. Over its whole path, learning and intelligence and integrity have shed their combined lustre. But its chief glory does and ever will radiate from those records in which it has explained, defended and enforced the Constitution. These are a great national monument so complete, so ample, and so harmonious in its parts, that if all preceding debates and commentaries upon the Constitution were lost, the Union would still have in the arguments of that court sufficient to elucidate its principles and limits and to explain nearly all that is doubtful in it.

The day of Chief Justice Marshall's appointment will ever be regarded as an epoch in the history of the Constitution. The rules of its interpretation were still to be



settled, and the meaning of its doubtful clauses to be fixed, by that authority which under the Constitution is final, and some of them regarded nothing less than the action of States and the government of a Nation. To have erred would have been to throw into disorder and convulsion the movements of the entire system. To have been suspected of incompetency would have been to strike out the department from the hearts of the people, and to have left the Union without a judiciary. What greater responsibility ever rested upon the judgments of a court? What greater triumph to human intellect and virtue than effectually to accomplish so great a work? What nobler destiny than to be qualified and appointed for the service? What eulogy is equal to so great a name as that of the man who gave the last sands of life to his eightieth year in completing so much of it, and in tracing the plan of all that is to be done hereafter? Let it not be supposed that I claim for him the exclusive merit. His modesty would reject it. Justice withholds it. He has had by his side men now resting from their labors like himself, and men still living to continue them, who have contributed by their talents and learning to all that has been done, and will ever be honored for it by their country. But it is both their praise and his that they have improved their own powers by the inspiration of his wisdom, and have been raised to their eminence, in part, by the attraction of his example. In him his country has seen that triple union of lawyer, statesman and patriot which completes the frame of a great constitutional judge; and if we add to it "the heart of the wise man," inspired with the love of God, of country, and of mankind, and showing it in the walks of private life as well as on the judgment seat, while we have that which the course of the world very rarely exhibits, we have no more than, for the example of the world, has been bestowed upon our country.

When the venerable life of the Chief Justice was near its close, he was called in the seventy-fifth year of his age to give his parting counsel to his native State in the revision of her Constitution. A spectacle of greater dignity than the Convention of Virginia in the year 1829 has been rarely exhibited. At its head was James Monroe, conducted to the chair by James Madison and John Marshall,

and surrounded by the strength of Virginia, including many of the greatest names of the Union. The questions to be agitated were of the last importance to the people of that State, and divided them as they were never before divided in any period of their history. The basis of representation and the tenure of judicial office, the former in by far the greater degree, were the occasion of fearful collisions in the Convention, threatening to break up the body into irreconcilable parties, and to spread the flames of civil discord through the State. It cannot be doubted that the presence and wisdom of these venerable persons assuaged the violence of the contest, and contributed to reduce the general temper to that tone of compromise and mutual concession in which the tranquillity of a diversified people can alone be found. The reverence manifested for Chief Justice Marshall was one of the most beautiful features of the scene. The gentleness of his temper, the purity of his motives, the sincerity of his convictions and his wisdom, were confessed by all. This was indeed a homage worthy of his virtue and of the eminent men who paid it. He stood in the center of his native State, in his very home of fifty years, surrounded by men who had known him as long as they had known anything, and there was no one to rise up, even to question his opinions, without a tribute to his personal excellence. He spoke upon both the great questions with brevity, and with no less than his usual power, consistently maintaining opinions which he had cherished from the outset of his life; but he was the counselor of peace, and in the spirit of religious charity, regarded with catholic good will those who differed from him. Upon one occasion he said: "After the warm language (to use the mildest phrase) which has been mingled with argument on both sides, I heard with inexpressible satisfaction propositions for compromise proposed by both parties in the language of conciliation. I hailed these auspicious appearances with as much joy as the inhabitant of the polar regions hails the reappearance of the sun after his long absence of six tedious months." This was the affection of his heart; but the spirit of his understanding still divided truth from error by a line as bright and distinct as the clearest hour of his meridian

day. It was particularly on the question of judicial tenure, the subject upon which he could speak after probably more personal reflection and observation than any man living, that he poured out his heartfelt convictions with an energy that belongs to nothing but truth. The proposed Constitution, while it adopted for the judges of the superior courts the tenure of good behavior, guarded by a clause against the construction which had in one instance prevailed, that the repeal of the law establishing the court, and by a mere majority, should dissolve the tenure and discharge the judge upon the world. In support of this clause, which was proposed by himself, and of the general principle of judicial independence, he spoke with the fervor and almost with the authority of an apostle. "The argument of the gentleman, he said, goes to prove not only that there is no such thing as judicial independence, but that there ought to be no such thing; that it is unwise and improvident to make the tenure of the judge's office to continue during good behavior. I have grown old in the opinion that there is nothing more dear to Virginia or ought to be more dear to her statesmen, and that the best interests of our country are secured by it. Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting — between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends upon that fairness? The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience?" "I acknowledge that in my judgment the whole good which may grow out of this convention, be it what it may, will never compensate for the evil of changing the judicial tenure of office." "I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted

upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary.”

These sentiments are worthy of the profoundest consideration. They were the last legacy of his political wisdom, from an incorruptible patriot, and one of the wisest of men. Standing as it were on the verge of life, free from all mixture and stain of selfish motive, having nothing to hope, nothing to fear from men, they are the parting testimony of his pure and disciplined reason. They are worthy of being written on the tables of the heart; and if elsewhere they may be disregarded in the spirit of change, or in the lust of experiment, let them animate us to preserve what we have, and to transmit it to our children.

Fellow-citizens, this admirable man, extraordinary in the powers of his mind, illustrious by his services, exalted by his public station, was one of the most warm-hearted, unassuming and excellent of men. His life, from youth to old age, was one unbroken harmony of mind, affections, principles and manners. His kinsman says of him: “He had no frays in boyhood; he had no quarrels or outbreakings in manhood; he was the composer of strifes; he spoke ill of no man; he meddled not with their affairs; he viewed their worst deeds through the medium of charity. He had eight sisters and six brothers, with all of whom, from youth to age, his intercourse was marked by the utmost kindness and affection; and although his eminent talents, high public character, and acknowledged usefulness could not fail to be a subject of pride and admiration to all of them, there is no one of his numerous relations, who has had the happiness of a personal association with him, in whom his purity, simplicity, and affectionate benevolence did not produce a deeper and more cherished impression than all the achievements of his powerful intellect.”

Another of his intimate personal friends has said of him: “In private life he was upright and scrupulously just in all his transactions. His friendships were ardent, sincere, and constant, his charity and benevolence unbounded. He was fond of society, and in the social circle cheerful and unassuming. He participated freely in conversation, but from modesty rather followed than led.



Magnanimous and forgiving, he never bore malice, of which illustrious instances might be given. A republican from feeling and judgment, he loved equality, abhorred all distinctions founded upon rank instead of merit, and had no preference for the rich over the poor. Religious from sentiment and reflection, he was a Christian, believed in the gospel, and practiced its tenets."

This is the unbought praise of deep affection and intimate knowledge. It finishes his character in all his relations.

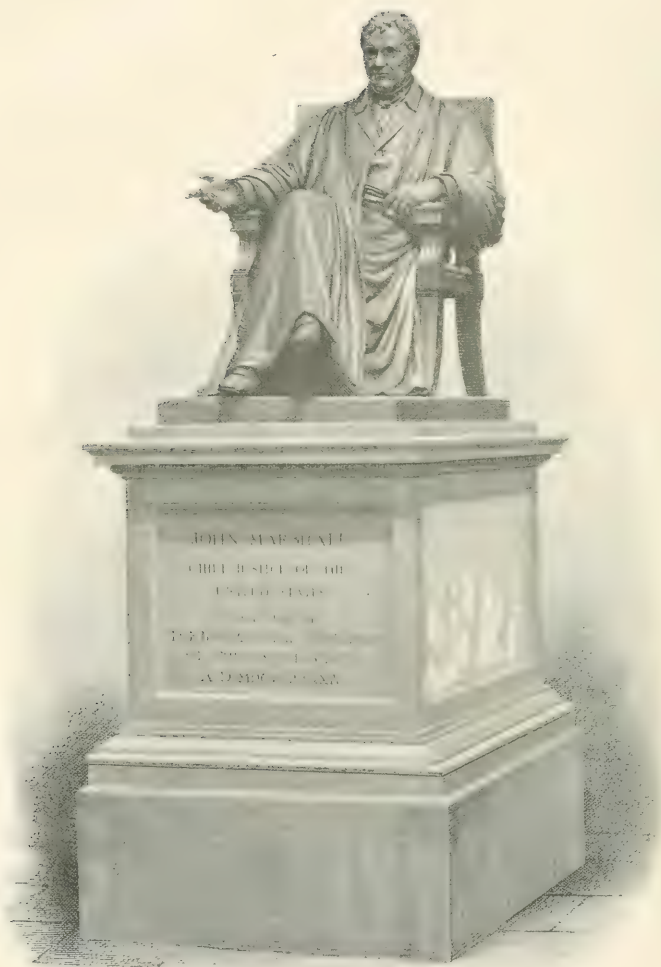
That with which a stranger was most struck in a first interview was the charm of his most engaging simplicity. The reputation of his remarkable powers of mind was co-extensive with our country. Every one who approached him for the first time was prepared to find something in the carriage of his person, the tones of his voice or the strain of his conversation which should distinguish him as much from men in general as he was raised above them by his station and intellect. But although these were extremely attractive and highly suitable, they did not display his mind so much as the benignity of his heart. There was in his daily manners an unconsciousness of what he was, or how he was estimated, and a freedom from effort, affectation and pretension, which makes the inscription he prepared for his monumental tablet a perfect representation of the simplicity of him that lies beneath it. It records no more than his name and that of his deceased wife, with the date of his birth and marriage, and leaves a blank for the year and day of his death.

The world, my fellow-citizens, has produced fewer instances of truly great judges than it has of great men in almost every other department of civil life. A large portion of the ages that are past have been altogether incapable of producing this excellence. It is the growth only of a government of laws, and of a political Constitution so free as to invite to the acquisition of the highest attainments and to permit the exercise of the purest virtues without exposure to degradation and contempt under the frown of power. The virtues of a prince may partially correct the mischiefs of arbitrary rule, and we may see some rare examples of judicial merit where the laws



have had no sanction and the government no foundation but in the uncontrolled will of a despot; but a truly great judge belongs to an age of political liberty and of public morality, in which he is the representative of the abstract justice of the people in the administration of the law, and is rewarded for the highest achievements of duty by proportionate admiration and reverence. Of all the constitutions of government known to man none are so favorable to the development of judicial virtue as those of America. None else confide to the judges the sacred deposit of the fundamental laws, and make them the exalted arbiters between the Constitution and those who have established it. None else give them so lofty a seat or invite them to dwell so much above the impure air of the world, the tainted atmosphere of party and of passion. None else could have raised for the perpetual example of the country and for the crown of undying praise so truly great a judge as John Marshall.





## II.

### Life, Character and Services of Chief Justice Marshall, by Joseph Story.<sup>1</sup>

The funeral obsequies have been performed; the long procession has passed by, and the earth has closed over the mortal remains of Chief Justice Marshall. Time has assuaged the first agonies of grief of the immediate relatives who were called to mourn over so afflictive a loss; and others, who, looking to the claims of private friendship or to the public interests, were astounded at a blow which, though not unexpected, came at last with a startling force, have had leisure to recover from their perturbation, and may now contemplate the event with a calm though profound melancholy.

It is under these circumstances that we are now assembled together to devote a brief space of time to the consideration of his life, character and services; and then to return again to the affairs of the world, edified as I may hope by what he was and warmed and elevated by a nearer approach to excellences, which, if we may not reach, we may yet gaze on with devout respect and reverence. I am not insensible of the difficulties of the task of worthily discharging the duties of the present occasion. I am but too conscious how much more successfully it would have been accomplished in other hands, and how little is my own ability to do justice even to my own feelings in attempting a sketch of such a man. I have not, however, felt at liberty to decline the part

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<sup>1</sup> A discourse pronounced on the 15th of October, 1835, at the request of the Suffolk Bar, and here republished in full. Justice Story's world-wide fame as jurist and judge, his means of knowledge derived from intimate personal association and friendship with Marshall for twenty-five years, and his sense of responsibility for whatever he might say concerning the Chief Justice and the court, give to this Eulogy an unique, recognized and permanent value

which has been assigned to me in the commemorations of this day, lest I should be thought wanting in readiness to do homage to one who was the highest boast and ornament of the profession. There is this consolation, nevertheless, in undertaking the task, that it requires no labored vindication of motives or actions. His life speaks its own best eulogy. It had such a simplicity, purity, consistency, and harmony, that the narrative of the events in their natural order invests it with an attraction which art need not seek to heighten, and friendship may well be content to leave with its original coloring.

Of the great men who have appeared in the world, many have been distinguished by the splendor of their birth or station; many by the boldness or variety of their achievements; and many by peculiarities of genius or conduct, which, from the extraordinary contrasts presented by them, have awakened the curiosity or gratified the love of novelty of the giddy multitude. I know not how it has happened, but so I fear the fact will be found to be, that high moral qualities are rarely the passport to extensive popular favor or renown. Nay; a calm and steady virtue, which acts temperately and wisely and never plunges into indiscretion or extravagance, is but too often confounded with dullness or frigidity of temperament. It seems as if it were deemed the prerogative if not the attribute of genius to indulge itself in eccentricities, and to pass from one extreme to another, leaving behind it the dark impressions of its vices or its follies. The deeper movements of the soul in the inmost workings of its thoughts are supposed to display themselves like volcanoes in the natural world, by occasional explosions which awe but at the same time excite the crowd of eager spectators. They are struck with admiration of what they do not comprehend, and mistake their own emotions for the presence of superior power. They are bewildered by the shifting exhibition, alternately of brilliant deeds and debasing passions, of intellectual efforts of transcendent energy, and paradoxes of overwrought ingenuity; and being unable to fathom the motives or sources of anomalies they confound extravagance with enterprise and the dreams of wild ambition with lofty and well-considered designs.



And yet if there is anything taught us, either by the precepts of Christianity or the history of our race, it is that true greatness is inseparable from sound morals; that the highest wisdom is but another name for the highest talents; that the genius which burns with a pure and regulated flame throws far and wide its beneficent light to guide and cheer us; while occasional corruscations serve only to perplex and betray us, or (to borrow the language of poetry) serve but to make the surrounding darkness more visible. The calm and patient researches of Newton and Locke have conferred far more lasting benefits on mankind than all the achievements of all the mere heroes and conquerors of ancient or modern times. One patriot like Epaminondas, Scipio or Washington outweighs a host of Alexanders, Cæsars and Napoleons. The fame of Justinian as a fortunate possessor of the imperial purple would have long since faded into an almost evanescent point in history, if his memorable Codes of Jurisprudence had not secured him an enviable immortality by the instruction which they have imparted to the legislation of all succeeding times. He who has been enabled, by the force of his talents and the example of his virtues, to identify his own character with the solid interests and happiness of his country; he who has lived long enough to stamp the impressions of his own mind upon the age, and has left on record lessons of wisdom for the study and improvement of all posterity; he, I say, has attained all that a truly good man aims at, and all that a truly great man should aspire to. He has erected a monument to his memory in the hearts of men. Their gratitude will perpetually, though it may be silently, breathe forth his praises; and the voluntary homage paid to his name will speak a language more intelligible and more universal than any epitaph inscribed on Parian marble, or any image wrought out by the cunning hands of sculpture.

Reflections like these naturally crowd upon the mind upon the death of every great man; but especially of every one who may be justly deemed a benefactor and ornament of his race. In the present case there is little occasion to point out the manner or the measure of their application.

John Marshall was born on the 24th day of September, 1755 (a little more than eighty years ago), in the county of Fauquier, in the State of Virginia. His father was Thomas Marshall, a native of the same State, and at the time of his birth a planter of narrow fortune and retired habits. Of this gentleman, who afterwards served with great distinction during the Revolutionary War, having been appointed to the command of one of the Continental regiments of infantry, it is proper to say a few words in this place. He was a man of uncommon capacity and vigor of intellect; and though his original education was very imperfect, he overcame this disadvantage by the diligence and perseverance with which he cultivated his natural endowments; so that he soon acquired, and maintained throughout the course of his life, among associates of no mean character, the reputation of masculine sense and extraordinary judgment and ability. No better proof, indeed, need be adduced to justify this opinion than the fact that he possessed the unbounded confidence, respect and admiration of all his children at that mature period of their lives when they were fully able to appreciate his worth, and to compare and measure him with other men of known eminence. I have myself often heard the Chief Justice speak of him in terms of the deepest affection and reverence. I do not here refer to his public remarks; but to his private and familiar conversations with me, when there was no other listener. Indeed, he never named his father on these occasions without dwelling on his character with a fond and winning enthusiasm. It was a theme on which he broke out with a spontaneous eloquence; and, in the spirit of the most persuasive confidence, he would delight to expatiate upon his virtues and talents. "My father," would he say with kindled feelings and emphasis, "my father was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life." Such praise from such lips is inexpressibly precious. I know not whether it be most honorable to the parent or to the child. It warms while it elevates our admiration of both. What, indeed, can be more affecting than such a tribute of filial gratitude to the memory of a parent, long after death has set its seal upon his character, and at such a

distance of time as leaves no temptation to pious sorrow to exaggerate what he was, or to excite the imagination to paint what he might have been.

Colonel Marshall had fifteen children, several of whom are still living. Some of them, besides the one of whom I am mainly to speak, have attained high distinction as scholars and statesmen; and one, whom I do not feel privileged to name, enjoys the reputation of a thorough acquaintance with that most difficult of all studies, the philosophy of history.

John was the eldest son and of course was the earliest to engage the solicitude of his father. The means of obtaining any suitable education at the family residence were at that period scanty and inadequate. Fauquier was then a frontier county in the State, and whoever will carry back his thoughts to the dangers and difficulties of such a local position, far in advance of the ordinary reach of compact population, will readily comprehend the embarrassments and sacrifices with which it was attended. Colonel Marshall was thus compelled exclusively to superintend the education of all his children; and, perceiving the rapid development of the talents of his eldest son, he gave him a decided taste for the study of English literature, and especially for poetry and history. At the age of twelve the latter had transcribed the whole of Pope's *Essay on Man* and some of his moral essays, and had committed to memory many of the most interesting passages of that distinguished poet.

The love of poetry, thus awakened in his warm and vigorous mind, soon exerted a commanding influence over it. He became enamored of the classical writers of the old English school, of Milton, and Shakespeare, and Dryden, and Pope; and was instructed by their solid sense and beautiful imagery. In the enthusiasm of youth he often indulged himself in poetical compositions and freely gave up his leisure hours to those delicious dreamings with the muses, which, say what we may, constitute with many the purest source of pleasure in the gayer scenes of life and the sweetest consolation in the hours of adversity. It has, indeed, been said by Sir James Mackintosh that all men of genius delight to take refuge in poetry from the vulgarity and irritation of business.

Without yielding to so general and sweeping a conclusion, it may be truly said that it is not uncongenial with the highest attributes of genius, and is often found an accompaniment of its nicer sympathies.

One of the best recommendations, indeed, of the early cultivation of a taste for poetry and the kindred branches of literature is that it does not expire with youth. It affords to maturer years a refreshing relaxation from the severe cares of business, and to old age a quiet and welcome employment, always within reach, and always bringing with it, if not the charm of novelty, at least the soothing reminiscences of other days. The votary of the muses may not always tread upon enchanted ground; but the gentle influences of fiction and song will steal over his thoughts and breathe, as it were, into his soul the fragrance of a second spring of life.

Throughout the whole of his life, and down to its very close, Mr. Marshall continued to cultivate a taste for general literature, and especially for those departments of it which had been the favorite studies of his youth. He was familiar with all its light, as well as its more recondite, productions. He read with intense interest, as his leisure would allow, all the higher literature of modern times; and, especially, the works of the great masters of the art were his constant delight. While the common publications of the day fell from his hands with a cold indifference, he kindled with enthusiasm at the names of the great novelists and poets of the age, and discussed their relative powers and merits with a nice and discriminating skill, as if he were but yesterday fresh from the perusal of them.

To many persons it may seem strange that such a love of letters, and especially of works of imagination, should ever be found combined with the severe logic and closeness of thought which belonged to his character, and gave such a grave cast to all his juridical labors. But the truth is that the union is far less uncommon in the highest class of minds than slight observers are apt to suppose. There is not only no incompatibility in pursuits of such opposite tendencies, but men of genius, more than any other persons, from their lively sensibility to excellence, are prone to have their curiosity awakened by any



exhibition of it, in whatever department of knowledge or art it may be displayed. They feel the presence of superior power; they are touched by the sublime reaches of kindred spirits; they gaze on the wonders of that workmanship whose exquisite proportions they understand, and whose difficulties of execution they appreciate. They see the glory of that eminence which is so proudly won and so bravely maintained. But they can also measure, what few other persons can, what vast resources and uncounted labors have been exhausted in the attainment. Thus, their sympathies are excited by every triumph of the human intellect; and the very contrast of their own favorite studies and pursuits with those of others opens upon them new sources of pleasure, in surveying the variety as well as the magnificence of human genius. But to return to my narrative.

There being no grammar school in the neighborhood, young Marshall, at the age of fourteen, was sent for his education about a hundred miles from his home, and was placed under the tuition of Mr. Campbell, a clergyman of great respectability. He remained with him a year and then returned home and was placed under the care of a Scotch gentleman who was just then inducted as pastor of the parish and resided in his father's family. He pursued his classical studies under the care of this reverend pastor as long as he resided in the family, which was about a year; and he had at that time commenced the reading of Livy and Horace. After this period he was left to his own unassisted diligence; and his subsequent mastery of the classics was accomplished without any other aids than his grammar and dictionary. He never had the benefit of any instruction in any college or other public institution; and his attainments in learning, such as they were, were nourished by the solitary vigils of his own genius. In English literature he continued to receive the fostering care and assistance of his father, who directed his studies and contributed, in an eminent degree, to cherish his love of knowledge; to give a solid cast to his acquirements; and to store his mind with the most valuable materials. It is to this circumstance that we are mainly to attribute that decided attachment to the writers of the golden age of English literature, which at all times



he avowed and vindicated with a glowing confidence in its importance and its superior excellence. His father, too, at this period, was not only a watchful parent, but a most useful and affectionate friend; and he became the constant, as he was also almost the only intelligent, companion of his son. The time which was not thus passed in the society of his father he employed in hardy, athletic exercises in the open air. He engaged in field sports; he wandered in the deep woods; he indulged his solitary meditations amidst the wilder scenery of nature; he delighted to brush away the earliest dews of the morning and to watch the varied magnificence of sunset until its last beams ceased to play on the dark tops of the noiseless forest. It was to these early habits in a mountainous region that he probably owed that robust and vigorous constitution which carried him almost to the close of his life with the freshness and firmness of manhood.

It was about the time when young Marshall entered on the eighteenth year of his age that the controversy between Great Britain and her American colonies, which ended in the establishment of the independence of the latter, began to assume a portentous aspect. It could not fail to engage the attention of all the colonists, whether they were young or old, in the retirement of private life or in the exercise of public political functions. It was a stirring theme of conversation involving interests of such vast magnitude and consequences of such enduring influence that every patriot felt himself called upon by a sense of duty to arouse himself for the approaching exigency. Young Marshall could not be indifferent to it. He entered into the controversy with all the zeal and enthusiasm of a youth full of the love of his country and deeply sensible of its rights and its wrongs. Partaking of the spirit and energy of his father he immediately devoted his time, with a prophetic foresight, to the acquisition of the rudiments of military manœuvres in an independent company of volunteers, composed of gentlemen of the same county, to the training of a company of the militia of the neighborhood and to the diligent reading of the political essays of the day. For these animating pursuits he was quite content to relinquish all his literary studies; and the pages of Blackstone's Commentaries, to

which he had already begun to direct his ambition, were forgotten amidst the din of arms and the preparations for open hostilities.

In the summer of 1775 he was appointed the first lieutenant of a company of minute men who were enrolled for active service and assembled in battalion at the beginning of the ensuing September. In a few days they were ordered to march into the lower country for the purpose of defending it against a small predatory force of regulars commanded by Lord Dunmore, and also of assisting in the relief of Norfolk, with some other provincial troops. Hearing of their approach Lord Dunmore took an advantageous position on the north side of Elizabeth, near the Great Bridge, and at a small distance from Norfolk. A battle soon afterwards took place between the opposing bodies, in which the British were repulsed with great gallantry. On this occasion Lieutenant Marshall took an active part, and had a full share of the honors of the day. The provincials, immediately after the retreat of the British, made their way to Norfolk, and Lieutenant Marshall was present when that city was set on fire by a detachment from the British ships then lying in the river.

In July, 1776, he received the appointment of first lieutenant in the eleventh regiment on the Continental establishment, and in the succeeding winter he marched with his regiment to the Middle States, then the scene of an harassing warfare; and in May, 1777, he was promoted to the rank of captain. From this period he remained constantly in service until the close of the year 1779. He was present at the skirmish with the British light infantry at Iron Hill, and he fought in the memorable battles of Brandywine, Germantown and Monmouth. During this period of his military life he was often employed to act as Deputy Judge Advocate, a situation which brought him to a large acquaintance with the officers of the army, by whom he was greatly beloved, and among whom he deservedly acquired an extensive influence. I myself have often heard him spoken of by some of these veterans in terms of the warmest praise. In an especial manner the Revolutionary officers of the Virginia line (now "few and faint, but fearless still") ap-

peared almost to idolize him, as an old friend and companion in arms, enjoying their unqualified confidence.

It was during his performance of the duties of Judge Advocate that he for the first time (I believe) became personally acquainted with General Washington, and (I am sure) with Colonel (afterwards General) Hamilton; for both of whom, it needs scarcely to be said, he always entertained the deepest respect, and whose unreserved friendship, at a subsequent period of his life, he familiarly enjoyed. His opinion of Washington is sufficiently manifested in his biography of that great man. Of Hamilton he always spoke in the most unreserved manner, as a soldier and statesman of consummate ability; and in point of comprehensiveness of mind, purity of patriotism, and soundness of principles, as among the first that had ever graced the councils of any nation. His services to the American Republic he deemed to have been of inestimable value, and such as had eminently conduced to its stability, its prosperity, and its true glory.

There being, in the winter of 1779, a great surplus of officers belonging to the Virginia line, beyond the immediate exigencies of the service, the supernumeraries, among whom was Captain Marshall, were directed to return home, in order to take charge of such men as the State Legislature might raise for their command. It was in this interval of military inactivity that he availed himself of the opportunity of attending at William and Mary College the course of law lectures of Mr. (afterwards Chancellor) Wythe, and the lectures upon natural philosophy of the then president of the college, Mr. (afterwards Bishop) Madison. He left that institution in the summer vacation of 1780, and soon afterwards received the usual license to practice law. In October of the same year he returned to the army, and continued in active service until after the termination of Arnold's invasion of Virginia. Finding that the same redundancy of officers in the Virginia line still continued, he then resigned his commission and addicted himself to the study of his future profession. The courts of law were suspended in Virginia until after the capture of Lord Cornwallis and his army at the memorable siege of Yorktown. As soon as they were reopened Mr. Marshall commenced the

practice of the law, and soon rose into high distinction at the bar.

In the spring of 1782 he was elected a member of the State Legislature, and in the autumn of the same year a member of the State Executive Council. In January, 1783, he married Miss Ambler, the daughter of the then Treasurer of the State, to whom he had become attached before he quitted the army. With this lady he lived in a state of the most devoted conjugal affection for nearly fifty years; and her death, not quite three years ago, cast a gloom over his thoughts, from which I do not think he ever fully recovered. About the time of his marriage he took up his permanent residence in the city of Richmond. In the spring of 1784 he resigned his seat at the council board in order to devote himself more exclusively to the duties of the bar. He was immediately afterwards elected a member of the Legislature by the county of Fauquier, a tribute of respect from the spot of his nativity the more marked because he had already ceased to have anything but a nominal residence there. In 1787 he was elected a member of the Legislature by the county of Henrico, and he soon embarked in all the perplexing political questions which then agitated the State.

It is to this period — between the close of the war of the Revolution and the adoption of the present Constitution of the United States — that we are to refer the gradual development and final establishment of those political opinions and principles which constituted the basis of all the public actions of his subsequent life. He had entered the army with all the enthusiasm of a young man, ardent in the cause of liberty, devoted to his country, glowing with confidence in the wisdom and virtue of the people, and unsuspecting that they could ever be seduced or betrayed into any conduct not warranted by the purest public principles. He knew the disinterestedness of his own heart, and he could not believe, nay, he could not even imagine, that it was possible that a republic, founded for the common good, should not, at all times and under all circumstances, be exclusively administered for this single purpose. The very suggestion of any doubt upon the subject led him to distrust, not his own judgment, but the intelligence or integrity of those who ventured to



breathe that doubt even in the softest whispers. He had never heard of the profound remark of a great statesman that a young man who was not an enthusiast in matters of government must possess low and groveling principles of action; but that an old man who was an enthusiast must have lived to little purpose. He could have learned nothing worth remembering; or remembered only what was fit to be forgotten. Like the shepherd in Virgil, in the simplicity of his heart he thought that all things were at Rome as they were at Mantua; — *Sic parvis componere magna solebat*. Amidst the din of arms he found no leisure to study the science of government. He deemed it useless to consider how liberty was to be enjoyed and protected until it was won. The contest for national existence was then instant and pressing. The only lights which were on the paths of the patriot to guide or instruct him were those which glanced from the point of his sword. The midnight hours were to be passed, not in soft serenities of meditation, but in mounting guard on the outposts; in stealthy patrols along the lines of the enemy; or in repelling the deadly attack in the midst of the flashes and the roar of well-directed musketry and cannon.

“When I recollect” (said he, in a letter written long afterwards to a friend) “the wild and enthusiastic notions with which my political opinions of that day were tinctured, I am disposed to ascribe my devotion to the Union and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time when the love of the Union, and the resistance to the claims of Great Britain, were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our suffering fellow-citizens of Boston were identical; when the maxim, ‘United we stand, divided we fall,’ was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable in a common cause, believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and Congress as my government.”



But the times were now arrived in which the dreams of his early manhood were to be rigidly compared with the sober realities about him. The Revolution, with its strong excitements, and its agitations of alternate hopes and fears, had passed away. The national independence had been achieved, and the feverish and restless activity of the past had given place to a state of languor and exhaustion which made the advent of peace itself a period of renewed anxieties and heavier cares. What had been gained by the sword was now to be secured by civil wisdom; by the establishment of wholesome laws, sound institutions and well-regulated government. And deeply and painfully did every lover of his country then feel the truth of the remark of Milton,—“Peace hath her victories, no less renowned than War.”

Whoever is well read in our domestic history cannot have forgotten the dangers and difficulties of those days. The close of the war of the Revolution found the whole country impoverished and exhausted by the necessary expenditures of the contest. Some of the States had made enormous sacrifices to provide their own just contributions for the public service, and most of them had been compelled to resort to the ruinous expedient of a paper currency to supply their own immediate wants. The national finances were at the lowest ebb of depression. The Continental Congress had issued more than three hundred millions of paper money, purporting on its face to contain a solemn pledge of the faith of the Union for its due redemption, which pledge had been as notoriously violated. And, indeed, this paper money had sunk to the value of one dollar only for one hundred, and at last had ceased in fact to circulate at all as currency. The national debt was not only not discharged, but was without any means of being discharged, even as to the interest due upon it. The army had been disbanded with long arrearages of pay outstanding; and the discontents of those noble bands which had saved the country were listened to, only to be disregarded. The very magnitude of the public evils almost discouraged every effort to redress them. The usual consequences of such a state of things had been fully realized. Private as well as public credit was destroyed; agricult-

ure and commerce were crippled; manufactures could not, in any strict sense, be said to have an existence. They were in a state of profound lethargy. The little money which yet remained in specie in the country was subject to a perpetual drain to purchase the ordinary supplies from foreign countries. The whole industry of the country was at a stand. Our artisans were starving in the streets, without the means or the habits of regular employment; and the disbanded officers of the army found themselves not only without resources, but without occupation. Under such circumstances the popular murmurs were not only loud, but deep; and the general distress became so appalling that it threatened a shipwreck of all our free institutions. In short, we seemed to have escaped from the dominion of the parent country only to sink into a more galling domestic bondage. Our very safety was felt to be mainly dependent upon the jealousy or forbearance of foreign governments.

What aggravated all these evils was the utter hopelessness of any effectual remedy under the existing form of the National Government; if, indeed, that might be said to deserve the name which was but the shadow of a government. The union of the States at the commencement of the Revolutionary contest was forced upon us by circumstances, and from its nature and objects seemed limited to that precise exigency. The Confederation, which was subsequently framed, was conceived in a spirit of extreme jealousy of national sovereignty, and withal was so feeble and loose in its texture that reflecting minds foresaw that it could scarcely survive the Revolutionary contest. Yet, feeble and loose as was its texture, it encountered the most obstinate opposition at every step of its progress, and it was not finally adopted until the war was about to close, in 1781. The powers of Congress, under the Confederation, were for the most part merely recommendatory, and to be carried into effect only through the instrumentality of the States. It conferred no power to raise revenue, or levy taxes, or enforce obedience to laws, or regulate commerce, or even to command means to pay our public ministers at foreign courts. Congress could make contracts, but could not provide means to discharge them. They could pledge

the public faith, but they could not redeem it. They could make public treaties, but every State in the Union might disregard them with impunity. They could enter into alliances, but they could not command men or money to give them vigor. They could declare war, but they could not raise troops; and their only resort was to requisitions on the States. In short, all the powers given by the Confederation which did not execute themselves without any external aid were at the mere mercy of the States, and might be trampled upon at pleasure. Even that miserable fragment of sovereignty, the power to levy a tax of five per cent. on imports in order to pay the public debt, and until it was paid, was solemnly rejected by the States, though asked by Congress in terms of humble entreaty, and the most affecting appeals to public justice.

The result was obvious. Without the power to lay taxes, Congress was palsied in all their operations. Without the power to regulate commerce, we were left to the capricious legislation of every State. Nay, more; our trade was regulated, taxed, monopolized and crippled at the pleasure of the maritime powers of Europe. Every State managed its own concerns in its own way; the systems of retaliation for real or imaginary grievances were perpetually devised and enforced against neighboring States. So that, instead of being a band of brothers, united in common cause and guided by a common interest, the States were everywhere secret or open enemies to each other; and we were on the verge of a border warfare of interminable irritation, and of as interminable mischiefs.

Such was the state of things in the time of which I have been speaking; and strong as the coloring may seem to those whose birth is of a later date, it falls far short of a full picture of the actual extent of the evils which the details of the facts would justify.

It was under these circumstances that the State Legislatures were constantly called upon by public clamor and private sufferings to interpose summary remedies to ward off the hardships of the times. The people, loaded with debts, and goaded on almost to madness by the thickening calamities, demanded measures of relief of the most extravagant nature. The relations of debtor and cred-

itor, always delicate, became every day more embarrassed and more embarrassing. Laws suspending the collection of debts, insolvent laws, instalment laws, tender laws and other expedients of a like nature which every reflecting man knew would only aggravate the evils, were familiarly adopted or openly and boldly vindicated. Popular leaders, as well as men of desperate fortunes, availed themselves (as is usual on such occasions), of this agitating state of things to inflame the public mind, and bring into public odium those wiser statesmen who labored to support the public faith and to preserve the inviolability of private contracts.

The whole country soon became divided into two great parties, one of which endeavored to put an end to the public evils by the establishment of an efficient National Government; the other adhered to the State sovereignties, and was determined at all hazards to resist the increase of the National power. Virginia bore her full share in these political controversies. They were constantly debated in the halls of her Legislature, and whatever might be the fate of any particular debate, the contest was perpetually renewed; for every victory was but a temporary and questionable triumph, and every defeat left still enough of hope to excite the vanquished to new exertions. At this distance of time it is scarcely possible to conceive the zeal, and even the animosity, with which the opposing opinions were maintained. The question whether the Union ought to be continued or dissolved by a total separation of the States was freely discussed; and either side of it was maintained, not only without reproach, but with an uncompromising fearlessness of consequences. Those who clung to the supremacy of the States looked without dismay upon a dissolution of the Union; and felt no compunctions in surrendering it. Those, on the other hand, who deemed the Union the ark of our political safety, without which independence was but a name, shrunk with horror from the thought of its dissolution, and maintained the struggle with a desperate valor, as the death-grapple for constitutional liberty.

It was in such times and under such circumstances that Mr. Marshall, while yet under thirty years of age, was



called upon to take an active part in the legislative deliberations, as well as in the popular meetings in his native State. "My immediate entrance," said he, in the letter already alluded to, "into the State Legislature opened to my view the causes which had been chiefly instrumental in augmenting those sufferings [meaning of the army]; and the general tendency of State politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized General Government." Mr. Madison was at that time, and had for some years before been, a member of the State Legislature; and stood forth on all occasions an inflexible and enlightened advocate for the Union; and General Washington was the acknowledged head and supporter of the same principles. Mr. Marshall at once arrayed himself on the side of these great leaders; and while Mr. Madison remained in the Legislature he gave him a bold and steady support in all the prominent debates. The friendship which was thus formed between them was never extinguished. The recollection of their co-operation at that period served, when other measures had widely separated them from each other, still to keep up a lively sense of each other's merits. Nothing, indeed, could be more touching to an ingenuous mind than to hear from their lips in their later years expressions of mutual respect and confidence; or to witness their earnest testimony to the talents, the virtues and the services of each other.

It was by this course of action in State legislation at this appalling period that Mr. Marshall was disciplined to the thorough mastery of the true principles of free government. It was here that he learned and practised those profound doctrines of rational, limited constitutional liberty, from which he never shrunk and to which he resolutely adhered to the end of his life. It was here that he became enamored, not of a wild and visionary republic, found only in the imaginations of mere enthusiasts as to human perfection, or tricked out in false colors by the selfish, to flatter the prejudices or cheat the vanity of the people; but of that well-balanced republic adapted to human wants and human infirmities, in which power is to be held in check by countervailing power;



and life, liberty and property are to be secured by a real and substantial independence, as well as division of the legislative, executive and judicial departments. It was here that he learned to love the Union with a supreme, unconquerable love; a love which was never cooled by neglect, or alienated by disappointment; a love which survived the trials of adversity, and the still more dangerous trials of prosperity; a love which clung more closely to its object as it seemed less dear or less valuable in the eyes of others; a love which faltered not, fainted not, wearied not, on this side the grave. Yes; his thoughts ever dwelt on the Union, as the first and best of all our earthly hopes. The last expressions which lingered on his dying lips breathed forth a prayer for his country.

“Such in that moment, as in all the past,  
‘O save my country, Heaven,’ was then his last.”

While these exciting discussions were absorbing the whole attention of the State Legislatures, the Confederation was obviously approaching its final dissolution. It had passed the crisis of its fate; and its doom was fixed. As a scheme of government it had utterly failed; and the moment was now anxiously expected, when from mere debility it would cease to have even a nominal existence, as it had long ceased to have any substantial authority. The friends of the Union determined to make one more and final effort. A convention was called which framed the Constitution of the United States; and it was presented to the people for their ratification or rejection. This measure at once gave rise to new and more violent political controversies; and the whole current of popular opinion was impetuously hurried into new channels. Parties for and against the adoption of the Constitution were immediately organized in every State; and the lines of political division were for the most part the same which marked the former parties. Virginia as a leading State became the scene of the most active exertions, and as many of her gifted and eloquent men were arrayed against the Constitution, so its friends rallied for the approaching struggle with a proportionate zeal and ability.

Mr. Marshall was chosen a member of the convention of Virginia which was called to deliberate upon the ratification of the Constitution, under circumstances peculiarly gratifying. A majority of the voters of the county in which he resided were opposed to the adoption of it; and he was assured that if he would pledge himself to vote against it all opposition to his election should be withdrawn; otherwise he would be strenuously resisted. He did not hesitate for a moment to avow his determination to vote for the Constitution. To use his own language: "The questions which were perpetually recurring in the State legislatures; and which brought annually into doubt principles which I thought most sacred; which proved that everything was afloat, and that we had no safe anchorage ground; gave a high value in my estimation to that article in the Constitution which imposes restrictions on the States. I was consequently a determined advocate for its adoption; and became a candidate for the convention." The opposition to him rallied with great force; but such was his personal popularity, and the sense of his integrity, or (as in his modesty he chose to express it) "parties had not yet become so bitter as to extinguish the private affections," that he was chosen by a triumphant majority.

Few assemblies have ever been convened under circumstances of a more solemn and imposing responsibility. It was understood that the vote of Virginia would have a principal and perhaps decisive influence upon several other States; and for some weeks the question of the adoption of the Constitution hung suspended upon the deliberations of that body. On one side were enlisted the powerful influence of Grayson, the strong and searching sense of George Mason, and the passionate and captivating eloquence of Patrick Henry. On the other side were the persuasive talents of George Nichols, the animated flow of Governor Randolph, the grave and sententious sagacity of Pendleton, the masculine logic of Marshall, and the consummate skill and various knowledge of Madison. Day after day, during the period of twenty-five days, the debate was continued with unabated ardor and obstinate perseverance. And it was not until it was known that the Constitution had already been

adopted by nine States (which settled its fate), that Virginia, by the small majority of *ten* votes, reluctantly gave her own voice in its favor.

During the whole of this most arduous and interesting contest the leading debates were principally conducted on opposite sides by Henry and Madison. Mr. Marshall contented himself with a constant support of his leader. But on three great occasions — the debate on the power of taxation, that on the power over the militia, and that on the powers of the judiciary — he gave free scope to his genius, and argued in their favor with commanding ability. The printed sketches of all these debates are confessedly loose and imperfect, and do little justice to the eloquence or ability of the respective speakers. Yet with all their imperfections the most careless observer cannot fail to perceive, in what is attributed to Mr. Marshall on these occasions, the closeness of logic, the clearness of statement, and the comprehensiveness of principles, which characterized his labors in the maturer periods of his life. I regret that the brief space of time allowed for the present notices does not justify me in the citation of some passages to illustrate these remarks.

It is difficult, perhaps it is impossible, for us of the present generation, to conceive the magnitude of the dangers which then gathered over our country. Notwithstanding all the sufferings of the people, the acknowledged imbecility, nay, the absolute nothingness of the Confederation, and the desperate state of our public affairs, there were men of high character, and patriots, too, who clung to the Confederation with an almost insane attachment. They had been so long accustomed to have all their affections concentrated upon the State Government, as their protection against foreign oppression, that a National Government seemed to them but another name for an overwhelming despotism. We have lived to see all their fears and prophecies of evil scattered to the winds. We have witnessed the solid growth and prosperity of the whole country, under the auspices of the National Government, to an extent never even imagined by its warmest friends. We have seen our agriculture pour forth its various products, created by a generous, I had almost said a profuse, industry. The miserable ex-

ports, scarcely amounting, in the times of which I have been speaking, in the aggregate to the sum of one or two hundred thousand dollars, now almost reach to forty millions a year in a single staple. We have seen our commerce, which scarcely crept along our noiseless docks, and stood motionless and withering, while the breezes of the ocean moaned through the crevices of our ruined wharves and deserted warehouses, spread its white canvass in every clime, and, laden with its rich returns, spring buoyant on the waves of the home ports, and cloud the very shores with forests of masts, over which the stars and stripes are gallantly streaming. We have seen our manufactures, awakening from a death-like lethargy, crowd every street of our towns and cities with their busy workmen and their busier machinery, and startling the silence of our wide streams, and deep dells and sequestered valleys. We have seen our wild waterfalls subdued by the power of man, become the mere instruments of his will, and, under the guidance of mechanical genius, now driving with unerring certainty the flying shuttle, now weaving the mysterious threads of the most delicate fabrics, and now pressing the reluctant metals into form, as if they were but playthings in the hands of giants. We have seen our rivers bear upon their bright waters the swelling sails of our coasters and the sleepless wheels of our steamboats in endless progress. Nay, the very tides of the ocean, in their regular ebb and flow in our ports, seem now but heralds to announce the arrival and departure of our uncounted navigation. We have seen all these things; and we can scarcely believe that there were days and nights, nay, months and years, in which our wisest patriots and statesmen sat down in anxious meditations to devise the measures which should save the country from impending ruin. The task was, indeed, most arduous; in which success was far more desired than expected. Obstinate prejudices were to be overcome, and popular influences were to be resisted. They could scarcely hope for their just rewards except from a distant posterity. But they were governed by a supreme love of their country, and the consciousness of the inestimable value of the objects, if achieved. Events, indeed, have far outstripped their most sanguine



imaginings. By the blessing of Providence we have risen, under the auspices of the Federal Constitution, from a feeble republic to a wide-spreading empire. Many of these patriots and statesmen went down to their graves without the consolation of having witnessed the glorious results of their labors. We owe them a debt of gratitude which can never be repaid. They laid the broad foundations of our Government upon public justice, public virtue and public liberty. They reared the superstructure with consummate skill and of the most solid materials. It is for us to say whether it shall remain through all ages an enduring monument of political wisdom; or, toppling from its height, shall bury under its ruins the glory of the past and the hopes of the future. It can be preserved only by untiring watchfulness. It may be destroyed by popular violence, or the madness of party, or the deeper sappings of corruption. It may, like the fragments of other great empires (may Heaven avert the evil!); it may

"Leave a name, at which the world grew pale,  
To point a moral, or adorn a tale."

But these are topics which, though not inappropriate upon the present occasion, are of themselves of too absorbing an interest to be discussed as mere incidents in the life of any individual. They may be glanced at in order to do justice to eminent patriotism; but they essentially belong to that philosophy which reads in the history of the past lessons of admonition and instruction for the ascertainment of the future. Tacitus in other days arrived at the melancholy conclusion, *Reipublicæ Forma laudari facilius, quam evenire; vel si evenit, hœud diuturna esse potest.*<sup>1</sup>

As soon as the adoption of the Constitution had been secured, Mr. Marshall immediately determined to relinquish public life, and to confine his labors to his profession. To this resolution, which was urged upon him by the claims of a growing family and a narrow fortune, he was not enabled to adhere with the steadfastness which he wished. The hostility already evinced against the establishment of the National Government was soon trans-

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<sup>1</sup> Tacitus, Annal., B. 4, n. 15.



ferred in Virginia to an opposition to all its leading measures. Under such circumstances, it was natural for the friends of the Constitution to seek to give it a strong support in the State Legislature. Mr. Marshall was accordingly compelled to yield to their wishes, and served as a member from 1788 to 1792. From the time of the organization of the government under President Washington, almost every important measure of his administration was discussed in the Virginia Legislature with great freedom, and no small degree of warmth and acrimony. On these occasions, it fell to the lot of Mr. Marshall to defend these measures, and to maintain the rights, duties and powers of the National Government against every attack; and he performed the service with great zeal, independence and ability. In 1792 he again retired from the State Legislature, and returned to his professional labors with increased activity; and soon found himself engaged in all the leading causes in the State and National tribunals. The excellent reports of this period by my lamented friend, Mr. Justice Washington, exhibit ample proofs of his success in argument.<sup>1</sup>

But, although Mr. Marshall was for some years withdrawn from public life, yet he was still compelled to take an active part in political discussions. The French Revolution, which at its early dawn had been hailed with universal enthusiasm throughout America, had now burst out into extravagances and butcheries which disgraced the cause of liberty and gave an unbounded license to ferocious mobs and demagogues. The monarchs of Europe, alarmed for their own safety, were soon leagued in a mighty confederacy to crush a revolution dangerous to the claims of legitimacy and the stability of thrones. It was easy to foresee that if their enterprises against France were successful, we, ourselves, should soon have but a questionable security for our own independence. It would be natural, after their European triumphs were complete, that they should cast their eyes across the Atlantic and trace back the original of the evil to the living example of constitutional liberty in this Western Hemisphere. Under such circumstances, notwithstanding all the ex-

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<sup>1</sup> See also Mr. Call's Reports.

cesses of the French Revolution, the mass of the American people continued to take the liveliest interest in it and to cherish the warmest wishes for its success. These feelings were heightened by the grateful recollection of the services rendered to us by France in our own Revolution and the consideration that she was struggling to relieve herself from oppressions under which she had been groaning for centuries. In this posture of affairs there was infinite danger that we should be driven from the moorings of our neutrality and should embark in the contest not only as an ally, but as a party foremost in the fight and in the responsibility. We were just recovering from the exhaustion and poverty and suffering consequent upon our own struggle; and the renewal of war would be fraught with immeasurable injuries, not only to our present interests, but to our future national advancement. France saw and felt the nature of our position; and partly by blandishments and partly by threats endeavored to enlist our fortunes, as she had already succeeded in enlisting our feelings in her favor. The other powers of Europe were not less eager in their gaze or less determined in their future course. England herself had already adopted precautionary measures to compel us to support our neutrality in an open and uncompromising manner or to assume the state of positive hostilities.

It was under these circumstances that President Washington, having determined to preserve our own peace and to vindicate our rights against all the belligerents with an even-handed justice, issued his celebrated Proclamation of Neutrality. The whole country was immediately thrown into a flame; and the two great parties, into which we were then divided, engaged, the one in denouncing it and the other in supporting it with intense zeal. On this occasion Mr. Marshall found himself, much to his regret, arranged on a different side from Mr. Madison. He resolutely maintained the constitutionality, the policy, nay, the duty of issuing the proclamation, by oral harangues and by elaborate writings. For these opinions he was attacked with great asperity in the newspapers and pamphlets of the day, and designated by way of significant reproach as the friend and coadjutor of Hamilton, a reproach which at all times he would have counted an

honor, but, when coupled (as it was) with the name of Washington, he deemed the highest praise. He defended himself against these attacks with an invincible firmness and ability proportioned to the occasion. He drew up a series of resolutions approving the conduct of the Executive and carried them by a decided majority at a public meeting of the citizens of Richmond.

The result of this controversy is well known. The administration was sustained in its course by the sober sense of the majority of the nation; and the doctrine then so strenuously contested and boldly denounced has ever since that time been laid up as among the most undisputable of executive rights and duties. Probably at the present day not a single statesman can be found of any influence in any party who does not deem the measure to have been as well founded in constitutional law as it was in sound policy.

In the spring of 1795 Mr. Marshall was again returned as a member of the State Legislature, not only without his approbation but against his known wishes. It was truly an honorable tribute to his merits; but it was demanded by the critical posture of our public affairs. The treaty with Great Britain, negotiated by that eminent patriot, Mr. Jay, was then the subject of universal discussion. As soon as the ratification of it was known to have been advised by the Senate, the opposition to it broke out with almost unexampled violence. Public meetings were called in all our principal cities for the purpose of inducing the President to withhold his ratification; and if this step should fail, then to induce Congress to withhold the appropriations necessary to carry the treaty into effect. Such a course, if successful (it was obvious), would at once involve us in a war with England and an alliance with France. The denunciations of the treaty were everywhere loud and vehement. The topics of animadversion were not confined to the policy or expediency of the principal articles of the treaty. They took a broader range; and the extraordinary doctrine was advanced and vigorously maintained that the negotiation of a commercial treaty by the Executive was an infringement of the Constitution and a violation of the power given to Congress to regulate commerce.

Mr. Marshall took an active part in all of the discussions upon this subject. Believing the treaty indispensable to the preservation of peace, and its main provisions beneficial to the United States, and consistent with its true dignity, he addressed himself with the most diligent attention to an examination of all the articles and of the objections urged against them. It was truly a critical period, not merely for the country, but also in an especial manner for the administration. Many of its sincere friends, from the boldness and suddenness of the attacks upon it, from the inflamed state of the public mind, and from a natural distrust of their own judgment upon topics full of embarrassment and novelty, remained in a state of suspense, or timidly yielded themselves to the prejudices of the times. It has been well observed in the biography of Washington that it is difficult now to review the various resolutions and addresses to which this occasion gave birth without feeling some degree of astonishment, mingled with humiliation, on perceiving such proofs of the deplorable fallibility of human reason.

In no State in the Union was a more intense hostility exhibited against the treaty than in Virginia; and in none were the objections against it urged with more unsparing or impassioned earnestness. The task, therefore, of meeting and overturning them was of no ordinary magnitude, and required the resources of a well-instructed mind. In some resolutions, passed at a meeting of the citizens of Richmond, at which Mr. Chancellor Wythe presided, the treaty was denounced "as insulting to the dignity, injurious to the interest, dangerous to the security and repugnant to the Constitution of the United States." At a meeting of the same citizens subsequently held, Mr. Marshall introduced certain resolutions in favor of the conduct of the Executive, and supported them in a masterly speech; the best comment upon which is that the resolutions were approved by a flattering majority.

But a more difficult and important duty remained to be performed. It was easily foreseen that the controversy would soon find its way into the State Legislature, and would there be renewed with all the bitter animosity of party spirit. So odious was the treaty in Virginia that Mr. Marshall's friends were exceedingly solicitous that he should not engage in any legislative debates on the sub-



ject, as it would certainly impair his well-earned popularity, and might even subject him to some rude personal attacks. His answer to all such suggestions uniformly was that he would not bring forward any measure to excite a debate on the subject; but if it were brought forward by others he would at all hazards vindicate the administration and assert his own opinions. The subject was soon introduced by the opposition; and, among other things, the constitutional objections were urged with triumphant confidence. Especially was that objection pressed which denied the constitutional right of the Executive to conclude a commercial treaty, as a favorite and unanswerable position. The speech of Mr. Marshall on this occasion has always been represented as one of the noblest efforts of his genius. His vast powers of reasoning were displayed with the most gratifying success. He demonstrated, not only from the words of the Constitution and the universal practice of nations, that a commercial treaty was within the scope of the constitutional powers of the Executive; but that this opinion had been maintained and sanctioned by Mr. Jefferson, by the Virginia delegation in Congress, and by the leading members of the Convention on both sides. The argument was decisive. The constitutional ground was abandoned, and the resolutions of the assembly were confined to a simple disapprobation of the treaty in point of expediency.

The constitutional objections were again urged in Congress, in the celebrated debate on the treaty, in the spring of 1796; and there finally assumed the mitigated shape of a right claimed by Congress to grant or withhold appropriations to carry treaties into effect. The higher ground, that commercial treaties were not, when ratified by the Senate, the supreme law of the land, was abandoned; and the subsequent practice of the government has, without serious question, been under every administration in conformity to the construction vindicated by Mr. Marshall. The fame of this admirable argument spread through the Union. Even with his political enemies it enhanced the estimate of his character; and it brought him at once to the notice of some of the most eminent statesmen who then graced the councils of the nation.



In the winter of 1796 Mr. Marshall visited Philadelphia to argue before the Supreme Court the great case of *Ware v. Hylton*, which involved the question of the right of recovery of British debts which had been confiscated during the Revolutionary War. It is well known that the question was decided against the side on which Mr. Marshall was employed. On this occasion he was opposed by three of the ablest lawyers then belonging to the Pennsylvania bar. This was, of itself, under such circumstances, no small distinction. But the sketch of the argument delivered by him, as we find it in the printed reports, affords conclusive evidence of his juridical learning, and the great skill with which he arranged his materials and sustained the interests of his client.

It was during this visit that he became personally acquainted with the distinguished men who were then in Congress as representatives from the Northern States. "I then became acquainted," says he, in a letter to a friend, "with Mr. Cabot, Mr. Ames, Mr. Dexter, and Mr. Sedgwick of Massachusetts, Mr. Wadsworth of Connecticut, and Mr. King of New York. I was delighted with these gentlemen. The particular subject (the British treaty) which introduced me to their notice was at that time so interesting, and a Virginian who supported, with any sort of reputation, the measures of the government, was such a *rara avis*, that I was received by them all with a degree of kindness which I had not anticipated. I was particularly intimate with Mr. Ames, and could scarcely gain credit with him when I assured him that the appropriations would be seriously opposed in Congress." The event proved that he was right. The high opinion which he then formed of these gentlemen continued to be cherished by him through all his future life.

About this period President Washington offered him the office of Attorney-General of the United States; but he declined it on the ground of its interference with his far more lucrative practice in Virginia. He continued, however, in the State Legislature; but he rarely engaged in the debates, except when the measures of the National Government were discussed and required vindication. Nor were the occasions few in which this task was required to be performed with a steady confidence. One of them

shall be mentioned in his own words. "It was, I think," said he, "in the session of 1796, that I was engaged in a debate which called forth all the strength and violence of party. Some Federalist moved a resolution expressing the high confidence of the House in the virtue, patriotism and wisdom of the President of the United States. A motion was made to strike out the word *wisdom*. In the debate the whole course of the administration was reviewed, and the whole talent of each party was brought into action. Will it be believed that the word was retained by a very small majority? A very small majority in the legislature of Virginia acknowledged the wisdom of General Washington!"

Upon the recall of Mr. Monroe as Minister to France, President Washington solicited Mr. Marshall to accept the appointment as his successor, but he respectfully declined it for the same reasons as he had the office of Attorney-General, and General Pinckney, of South Carolina, was appointed in his stead. "I then thought," said he, "my determination to remain at the bar unalterable. My situation at the bar appeared to me to be more independent, and not less honorable, than any other; and my preference for it was decided."

But he was not long permitted to act upon his own judgment and choice. The French Government refused to receive General Pinckney; and Mr. Adams (who had then succeeded to the Presidency), from an anxious desire to exhaust every measure of conciliation not incompatible with the national dignity, in June, 1797, appointed Mr. Marshall, General Pinckney and Mr. (afterwards Vice-President) Gerry, Envoys Extraordinary to the Court of France. After no inconsiderable struggles in his own mind (which are fully developed in a paper now in my possession) Mr. Marshall accepted the appointment and proceeded to Paris, and there, with his colleagues, entered upon the duties of the mission. It is well known that the mission was unsuccessful, the French government having refused to enter into any negotiations. The preparation of the official dispatches addressed to that government upon this occasion was confided to Mr. Marshall, and these dispatches have been universally admired. They are models of skilful rea-

soning, clear illustration, accurate detail and urbane and dignified moderation. They contain a most elaborate review of all the principles of national law applicable to the points in controversy between the two nations. As state papers, there are not in the annals of our diplomacy any upon which an American can look back with more pride, or from which he can draw more various instruction.

On his return home Mr. Marshall resumed his professional business, and had the best reasons to believe that it would be increased rather than diminished by his temporary absence. He was determined to pursue it with renewed ardor. But from this determination he was again diverted by a personal appeal made to him by General Washington, who earnestly insisted that he should become a candidate for Congress. After a conversation between them of the deepest interest and animation, and breathing on each side a spirit of the purest patriotism, Mr. Marshall reluctantly yielded to the wishes of General Washington and became a candidate, and was elected after a most ardent political contest, and took his seat in Congress in December, 1799. While he was yet a candidate President Adams offered him the seat on the bench of the Supreme Court then vacant by the death of Mr. Justice Iredell. He immediately declined it, and it was conferred on that excellent magistrate, Mr. Justice Washington.

The session of Congress in the winter of 1799 and 1800 will be forever memorable in our political annals. It was the moment of the final struggle for power between the two great political parties which then divided the country, and ended, as is well known, in the overthrow of the Federal administration. Men of the highest talents and influence were there assembled and arrayed in hostility to each other, and were excited by all the strongest motives which can rouse the human mind — the pride of power, the hope of victory, the sense of responsibility, the devotion to principles deemed vital, and the bonds of long political attachment and action. Under such circumstances (as might naturally be expected) every important measure of the administration was assailed with a bold and vehement criticism, and was de-

fended with untiring zeal and firmness. Mr. Marshall took his full share of the debates, and was received with a distinction proportioned to his merits. Such a distinction, in such a body, is a rare occurrence, for years of public service and experience are usually found indispensable to acquire and justify the confidence of the House of Representatives.

It is not my intention to enter into a minute detail of the debates in which Mr. Marshall took a part, or to vindicate his votes or opinions. The duty is more appropriate for a different labor. On one occasion, however, he took a leading part in a most important debate, which acquired for him a wide public fame, and therefore requires notice in this place. I allude to the debate on the case of Thomas Nash, otherwise called Jonathan Robbins, who had been surrendered to the British government for trial for a supposed murder committed by him on board of a British ship of war. Certain resolutions were brought forward censuring the conduct of the Executive for this act in terms of decided disapprobation, as unconstitutional and improper. Mr. Marshall in the course of the debate delivered a speech in vindication of the right and duty of the Executive to make the surrender, which placed him at once in the first rank of constitutional statesmen. The substance of it is now in print. It is one of the most consummate juridical arguments which was ever pronounced in the halls of legislation; and equally remarkable for the lucid order of its topics, the profoundness of its logic, the extent of its research and the force of its illustrations. It may be said of that speech, as was said of Lord Mansfield's celebrated Answer to the Prussian Memorial, it was *Réponse sans réplique*, an answer so irresistible that it admitted of no reply. It silenced opposition, and settled then and forever the points of national law upon which the controversy hinged. The resolutions did not, indeed, fall lifeless from the Speaker's table, though they were negatived by a large majority. But a more unequivocal demonstration of public opinion followed. The denunciations of the Executive, which had hitherto been harsh and clamorous everywhere throughout the land, sunk away at once into cold and cautious whispers only of disapprobation. Who-



ever reads that speech, even at this distance of time, when the topics have lost much of their interest, will be struck with the prodigious powers of analysis and reasoning which it displays, and which are enhanced by the consideration that the whole subject was then confessedly new in many of its aspects.

In May, 1800, President Adams, without any personal communication with Mr. Marshall, appointed him Secretary of War. Before, however, he was called to enter upon the duties of that office, the known rupture took place between the President and Colonel Pickering; and Mr. Marshall was appointed Secretary of State in the stead of the latter. The appointment was every way honorable to his merits, and no one doubted that he was eminently qualified for the discharge of its arduous and important duties.

And here I cannot but take great pleasure in recording a circumstance equally honorable to all the parties concerned. Without intending in the slightest degree to enter upon the discussion of the controversy between the President and Colonel Pickering, I may be permitted to say that the circumstances necessarily attending the dismissal of the latter from office were calculated to awaken a strong sense of injustice in the mind of an officer of unquestionable integrity and patriotism. The rupture grew out of a very serious difference of opinion upon very grave political measures, and Mr. Marshall entertained a decided attachment to the views of the President. Under such circumstances, it would have been not unnatural that the late Secretary should have felt some prejudices against his successor; and that there should have been some withdrawal of mutual confidence and perhaps respect between them. No such event occurred. On the contrary, each, to the day of his death, spoke of the other in terms of enviable commendation; and their mutual frank and familiar friendship was never in the slightest manner interrupted. I have often listened to the spontaneous praise bestowed upon Mr. Marshall by Colonel Pickering (a man to whom might justly be applied the character,—*Incorrupta fides nudaque veritas, et mens conscia recti*), in his own peculiar circle of friends with un-mixed delight. It was full, glowing and affecting. It



was a tribute from one of such sincerity of thought and purpose, that praise, even when best deserved, came from his lips with a studied caution of language. His conversation, always instructive, on these occasions rose into eloquence, beautiful, nay, touched with a moral sublimity. When all the circumstances are considered, I think that I do not overestimate the value of this example of mutual confidence and friendship when I pronounce it as gratifying as it is rare. It prostrates in the dust all petty rivalry for public distinction. It shows that great minds (and perhaps great minds only) fully understand that exquisite moral truth that no man stands in another man's way in the road to honor; and that the world is wide enough for the fullest display of the virtues and talents of all, without intercepting a single ray of light reflected by any.

On the 31st of January, 1801, Mr. Marshall received the appointment of Chief Justice of the United States. It is due to his memory to state that it was conferred on him, not only without his own solicitation (for he had in fact recommended another person for the office), but by the prompt and spontaneous choice of President Adams upon his own unassisted judgment. The nomination was unanimously confirmed by the Senate; and the Chief Justice accordingly took his seat on the bench at the ensuing term of the Supreme Court. I trust that I am not violating any private confidence when I quote, from a letter of the distinguished son of this distinguished patriot, a passage on this subject to which the whole country will respond without hesitation. It inclosed a judicial commission to a gentleman, now justly enjoying the highest professional reputation; and says with equal felicity and truth — "One of the last acts of my father's administration was the transmission of a commission to John Marshall, as Chief Justice of the United States. One of the last acts of my administration is the transmission of the inclosed commission to you. If neither of us had ever done anything else to deserve the approbation of our country, and of posterity, I would proudly claim it of both for these acts, as due to my father and myself." The claim is, indeed, a proud claim to distinction. It has received, as it deserved, the approbation of

the whole country. The gratitude of posterity will also do just homage to the sagacity, foresight, disinterestedness and public spirit of the choice. It was in moral dignity the fit close of a political life of extraordinary brilliancy. In public importance it scarcely yielded to any act of that life, except the motion for the Declaration of Independence. Such honor from such hands was felt to be doubly dear. It was the highest praise from one whose title to confer it had been earned by long services in the cause of liberty. The names of Adams and Marshall became thus indissolubly connected in the juridical and constitutional history of the country.

From this time until his death the Chief Justice continued in the discharge of the duties of his exalted office with unsullied dignity and constantly increasing reputation. Notwithstanding his advancing years, no sensible inroad had been made upon his general health until the last term of the court, when it was obvious that his physical strength had passed the utmost stretch of its vigor and was in a state of rapid decline. His intellectual powers still, however, retained their wonted energy; and, though he was suffering under great bodily pain, he not only bore it with an uncomplaining spirit, but continued to take his full share of the business of the court. No better proof need be required of his intellectual ability than his opinions, which stand recorded in the last volume of reports.

At the close of the term he returned to his residence in Virginia; and he was afterwards induced, by the solicitations of his friends, to visit Philadelphia, in the expectation of receiving some aid from the distinguished medical skill of that city. His constitution, however, had become so shattered that little more remained to be done, during the last weeks of his life, than to smooth the downward path towards the grave. He died on the 6th day of July last past, about six o'clock in the evening, in the arms of his children, without a struggle; and, to use the expressive language of one who was present, his last breath was the softest whisper of a zephyr. Fortunately, by the considerate kindness of his friends, he was spared the knowledge of the death of his eldest son, who lost his life a few days before by a most calamitous accident; an

event which, from the high character of the son, and his strong affection for him, would have filled his last hours with inexpressible anguish.

He was fully aware of his approaching end, and prepared to meet it with a calmness built upon the fixed principles by which he had regulated his life. Two days only before his death he wrote an inscription to be placed on his tomb, in the following simple and modest terms: "John Marshall, son of Thomas and Mary Marshall, was born on the 24th of September, 1755, intermarried with Mary Willis Ambler the 3d of January, 1783, departed this life the — of —, 18—."

What can be more affecting than these few facts, the only ones which he deemed in his last moments worth recording! His birth; his parentage; his marriage; his death. His parents, to whose memory he was attached with a filial piety, full of reverence;—his marriage to the being whom he had loved with a singleness and devotedness of affection never surpassed;—his own birth, which seemed principally memorable to him, as it connected him with beings like these;—his own death, which was but an event to re-unite him with those who had gone before, in a world where there should be no more suffering or sorrow; but kindred souls should dwell together, even as the angels in Heaven.

I have now finished the narrative of the life of Chief Justice Marshall, a life which, though unadorned by brilliant passages of individual adventure or striking events, carries with it (unless I am greatly mistaken) that which is the truest title to renown, a fame founded on public and private virtue. It has happened to him, as to many other distinguished men, that his life had few incidents; and those which belonged to it were not far removed from the ordinary course of human events. That life was filled up in the conscientious discharge of duty. It was throughout marked by a wise and considerate propriety. His virtues expanded with the gradual development of his character. They were the natural growth of deep-rooted principles working their way through the gentlest affections and the purest ambition. No man ever had a loftier desire of excellence; but it was tempered by a kindness which subdued envy and a diffidence

which extinguished jealousy. Search his whole life, and you cannot lay your finger on a single extravagance of design or act. There were no infirmities leaving a permanent stain behind them. There were no eccentricities to be concealed; no follies to be apologized for; no vices to be blushed at; no rash outbreakings of passionate resentment to be regretted; no dark deeds, disturbing the peace of families, or leaving them wretched by its desolations. If here and there the severest scrutiny might be thought capable of detecting any slight admixture of human frailty, it was so shaded off in its coloring that it melted into some kindred virtue. It might with truth be said that the very failing leaned to the side of the charities of life, and carried with it the soothing reflection — *Non multum abludit imago*. It might excite a smile; it could never awaken a sigh.

Indeed, there was in him a rare combination of virtues such only as belongs to a character of consummate wisdom; a wisdom which looks through this world, but which also looks far beyond it for motives and objects. I know not whether such wisdom ought to be considered as the cause or the accompaniment of such virtues, or whether they do not in truth alternately act upon and perfect each other.

I have said that there was in him a rare combination of virtues. If I might venture, upon so solemn an occasion, to express my own deliberate judgment, in the very terms most significant to express it, I should say that the combination was so rare that I have never known any man whom I should pronounce more perfect. He had a deep sense of moral and religious obligation, and a love of truth, constant, enduring, unflinching. It naturally gave rise to a sincerity of thought, purpose, expression and conduct which, though never severe, was always open, manly and straightforward. Yet it was combined with such a gentle and bland demeanor that it never gave offense; but it was, on the contrary, most persuasive in its appeals to the understanding.

Among Christian sects he personally attached himself to the Episcopal Church. It was the religion of his early education, and became afterwards that of his choice. But he was without the slightest touch of bigotry or in-



tolerance. His benevolence was as wide as Christianity itself. It embraced the human race. He was not only liberal in his feelings and principles, but in his charities. His hands were open upon all occasions to succor distress, to encourage enterprise and to support good institutions.

He was a man of the most unaffected modesty. Although I am persuaded that no one ever possessed a more entire sense of his own extraordinary talents and acquirements than he, yet it was a quiet, secret sense, without pride and without ostentation. May I be permitted to say that, during a most intimate friendship of many, many years I never upon any occasion was able to detect the slightest tincture of personal vanity. He had no desire for display; and no ambition for admiration. He made no effort to win attention in conversation or argument beyond what the occasion absolutely required. He sought no fine turns of expression, no vividness of diction, no ornate elegancies of thought, no pointed sentences, to attract observation. What he said was always well said, because it came from a full mind, accustomed to deep reflection; and he was rarely languid, or indifferent to topics which interested others. He dismissed them without regret, though he discussed them with spirit. He never obtruded his own opinions upon others, but brought them out only as they were sought, and then with clearness and calmness. Upon a first introduction, he would be thought to be somewhat cold and reserved; but he was neither the one nor the other. It was simply a habit of easy taciturnity, waiting, as it were, his own turn to follow the line of conversation and not to presume to lead it. Even this habit melted away in the presence of the young, for he always looked upon them with a sort of parental fondness, and enjoyed their playful wit and fresh and confident enthusiasm. Meet him in a stage-coach, as a stranger, and travel with him a whole day and you would only be struck with his readiness to administer to the accommodations of others and his anxiety to appropriate the least to himself. Be with him, the unknown guest at an inn, and he seemed adjusted to the very scene, partaking of the warm welcome of its comforts, whenever found; and if not found, resigning him-



self without complaint to its meanest arrangements. You would never suspect, in either case, that he was a great man; far less that he was the Chief Justice of the United States. But if perchance, invited by the occasion, you drew him into familiar conversation, you would never forget that you had seen and heard that "old man eloquent."

He had great simplicity of character, manners, dress and deportment, and yet a natural dignity that suppressed impertinence and silenced rudeness. His simplicity was never accompanied with that want of perception of what is right and fit for the occasion; of that grace which wins respect, or that propriety which constitutes the essence of refined courtesy. And yet it had an exquisite *nüiveté*, which charmed every one and gave a sweetness to his familiar conversations, approaching to fascination. The first impression of a stranger, upon his introduction to him, was generally that of disappointment. It seemed hardly credible that such simplicity should be the accompaniment of such acknowledged greatness. The consciousness of power was not there; the air of office was not there; there was no play of the lights or shades of rank, no study of effect in tone or bearing. You saw at once that he never thought of himself, and that he was far more anxious to know others than to be known by them. You quitted him with increased reverence for human greatness, for in him it seemed inseparable from goodness. If vanity stood abashed in his presence, it was not that he rebuked it, but that his example showed its utter nothingness.

He was a man of deep sensibility and tenderness; nay, he was an enthusiast in regard to the domestic virtues. He was endowed by nature with a temper of great susceptibility, easily excited, and warm when roused; but it had been so schooled by discipline, or rather so moulded and chastened by his affections, that it seemed in gentleness like the distilling dews of evening. It had been so long accustomed to flow in channels where its sole delight was to give or secure happiness to others that no one would have believed that it ever could have been precipitate or sudden in its movements. In truth, there was, to the very close of his life, a romantic chivalry in his feelings,

which, though rarely displayed, except in the circle of his most intimate friends, would there pour out itself with the most touching tenderness. In this confidential intercourse, when his soul sought solace from the sympathy of other minds, he would dissolve in tears at the recollection of some buried hope or lost happiness. He would break out into strains of almost divine eloquence while he pointed out the scenes of former joys, or recalled the memory of other days, as he brought up their images from the dimness and distance of forgotten years and showed you at once the depth with which he could feel, and the lower depths in which he could bury his own closest, dearest, noblest emotions. After all, whatever may be his fame in the eyes of the world, that which, in a just sense, was his highest glory, was the purity, affectionateness, liberality and devotedness of his domestic life. Home, home, was the scene of his real triumphs. There he indulged himself in what he most loved, the duties and blessings of the family circle. There his heart had its full play, and his social qualities, warmed, and elevated, and refined by the habitual elegancies of taste, shed around their beautiful and blended lights. There the sunshine of his soul diffused its soft radiance and cheered and soothed and tranquillized the passing hours.

May I be permitted also in this presence to allude to another trait in his character, which lets us at once into the inmost recesses of his feelings with an unerring certainty. I allude to the high value in which he held the female sex, as the friends, the companions, and the equals of man. I do not here mean to refer to the courtesy and delicate kindness with which he was accustomed to treat the sex; but rather to the unaffected respect with which he spoke of their accomplishments, their talents, their virtues and their excellences. The scoffs and jeers of the morose, the bitter taunts of the satirist and the lighter ridicule of the witty so profusely and often so ungenerously poured out upon transient follies or fashions, found no sympathy in his bosom. He was still farther above the commonplace flatteries by which frivolity seeks to administer aliment to personal vanity, or vice to make its approaches for baser purposes. He spoke of the sex

when present as he spoke of them when absent, in language of just appeal to their understandings, their tastes and their duties. He paid a voluntary homage to their genius and to the beautiful productions of it which now adorn almost every branch of literature and learning. He read those productions with a glowing gratitude. He proudly proclaimed their merits, and vindicated on all occasions their claims to the highest distinction. And he did not hesitate to assign to the great female authors of our day a rank not inferior to that of the most gifted and polished of the other sex. But above all he delighted to dwell on the admirable adaptation of their minds and sensibilities and affections to the exalted duties assigned to them by Providence. Their superior purity, their singleness of heart, their exquisite perception of moral and religious sentiment, their maternal devotedness, their uncomplaining sacrifices, their fearlessness in duty, their buoyancy in hope, their courage in despair, their love, which triumphs most when most pressed by dangers and difficulties; which watches the couch of sickness, and smooths the bed of death, and smiles even in the agonies of its own sufferings; — these, these were the favorite topics of his confidential conversation, and on these he expatiated with an enthusiasm which showed them to be present in his daily meditations.

I have hitherto spoken of traits of character belonging in a great measure to his private life. Upon his public life we may look with equal satisfaction. It was without stain or blemish. It requires no concealment or apology, and may defy the most critical and searching scrutiny. He was never seduced by the allurements of office to a desertion of his principles. He was never deterred from an open vindication of them by popular clamor or party cabal, by the frowns of power or the fury of mobs. His ambition took a loftier range. He aspired to that fame which is enduring and may justly be conferred by future ages; not to that fame which swells with the triumphs of the day, and dies away long before it can reach the rising generation. To him might be applied the language of another great magistrate<sup>1</sup> — he

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<sup>1</sup> Lord Mansfield, 4 Burr. 2562.

wished for popularity; that popularity which follows, not that which is run after; that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. He would not do what his conscience told him was wrong to gain the huzzas of thousands, or the daily praise of all the papers which came from the press. He would not avoid to do what he thought was right, though it should draw on him the whole artillery of libels; all that falsehood or malice could invent, or the credulity of a deluded populace could swallow.

There was throughout his political life a steadfastness and consistency of principle as striking as they were elevating. During more than half a century of public service he maintained with inflexible integrity the same political principles with which he begun. He was content to live *by, with, and for* his principles. Amidst the extravagances of parties at different times he kept on the even tenor of his way with a calm and undeviating firmness, never bending under the pressure of adversity, or bounding with the elasticity of success. His counsels were always the counsels of moderation, fortified and tried by the results of an enlightened experience. They never betrayed either timidity or rashness. He was in the original, genuine sense of the word a Federalist — a Federalist of the good old school, of which Washington was the acknowledged head, and in which he lived and died. In the maintenance of the principles of that school he was ready at all times to stand forth a determined advocate and supporter. On this subject he scorned all disguise; he affected no change of opinion; he sought no shelter from reproach. He boldly, frankly and honestly avowed himself, through evil report and good report, the disciple, the friend, and the admirer of Washington and his political principles. He had lived in times when these principles seemed destined to secure to the party to which he belonged an enduring triumph. He had lived to see all these prospects blasted, and other statesmen succeed with a power and influence of such vast extent that it extinguished all hopes of any future return to office. Yet he remained unshaken, unseduced, unterrified. He had lived to see many of his old friends pass on the other side; and the gallant band with which he had borne the strife



drop away by death, one after another, until it seemed reduced to a handful. Yet he uttered neither a sigh nor a complaint. When, under extraordinary excitements in critical times, others with whom he had acted despaired of the republic, and were willing to yield it up to a stern necessity, he resisted the impulse and clung to the Union and nailed its colors to the mast of the Constitution.

It is no part of my duty or design upon the present occasion to expound or vindicate his political opinions. That would of itself furnish ample materials for a discourse of a different character. But it is due to truth to declare that no man was ever more sincerely attached to the principles of free government; no man ever cherished republican institutions with more singleness of heart and purpose; no man ever adhered to his country with a stronger filial affection; no man in his habits, manners, feelings, pursuits, and actions, ever exemplified more perfectly that idol of chivalry, a patriot without fear and without reproach. But, on the other hand, no man was ever more sensible of the dangers incident to free institutions, and especially of those which threaten our national existence. He saw and felt where the weaknesses of the republic lay. He wished, earnestly wished, perpetuity to the Constitution, as the only solid foundation of our national glory and independence. But he foresaw what our course would be; and he never hesitated to express what his fears were, and whence the ruin of the Constitution must come, if it shall come at all. In his view the republic is not destined to perish, if it shall perish, by the overwhelming power of the National Government, but by the resisting and counteracting power of the State sovereignties. He thought with another kindred mind, whose vivid language still rings in my ears after many years, as a voice from the dead, that in our government the centrifugal force is far greater than the centripetal; that the danger is not that we shall fall into the sun, but that we may fly off in eccentric orbits and never return to our perihelion. Whether his prophetic fears were ill or well founded time alone can decide; — time, which sweeps away the schemes of man's invention, but leaves immovable on their foundations the eternal truths of nature.



Hitherto I have spoken of the attributes belonging to his moral character and the principles which governed his life and conduct. On these I confess that I dwell with a fond and reverential enthusiasm. There was a daily beauty in these which captivated the more the nearer they were approached and the more they were gazed on. Like the softened plays of moonlight they served to illuminate all objects at the same time that they mellowed and harmonized them. But I am admonished that the duties of the present occasion require me to dwell rather on his intellectual than his moral qualities. He stands before us rather as the head of a learned profession than as a private citizen or as a statesman.

He was a great man. I do not mean by this that among his contemporaries he was justly entitled to a high rank for his intellectual endowments, an equal among the master-spirits of the day, if not *facile princeps*. I go farther and insist that he would have been deemed a great man in any age, and of all ages. He was one of those to whom centuries alone give birth; standing out, like beacon lights on the loftiest eminences, to guide, admonish and instruct future generations as well as the present. It did not happen to him, as it has happened to many men of celebrity, that he appeared greatest at a distance; that his superiority vanished on a close survey; and that familiarity brought it down to the standard of common minds. On the contrary it required some degree of intimacy fully to appreciate his powers; and those who knew him best, and saw him most, had daily reason to wonder at the vast extent and variety of his intellectual resources.

His genius was rather contemplative than imaginative. It seemed not so much to give direction to his other intellectual powers as to receive its lead from them. He devoted himself principally to serious and profound studies; and employed his invention rather to assist philosophical analysis than to gather materials for ornament, for persuasion or for picturesque effect. In strength and depth and comprehensiveness of mind, it would be difficult to name his superior. He sought for truths far beyond the boundaries to which inquisitive and even ambitious minds are accustomed to push their inquiries. He traced them

out from their first dim lights and paly glimmers until they stood embodied before him with a clear and steady brightness. His sagacity was as untiring as it was acute; and he saw the conclusion of his premises at such vast distances and through such vast reaches of intermediate results that it burst upon other minds as a sort of instant and miraculous induction. It was said by a distinguished political opponent who had often felt the power of his reasoning that he made it a rule in argument never to admit any proposition asserted by the Chief Justice, however plain and unquestionable it might seem to be; for, if the premises were once admitted, the conclusion, however apparently remote, flowed on with an irresistible certainty. His powers of analysis were indeed marvelous. He separated the accidental from the essential circumstances with a subtilty and exactness which surprised those most who were accustomed to its exercise. No error in reasoning escaped his detection. He followed it through all its doublings until it became palpable and stripped of all its disguises. But what seemed peculiarly his own was the power with which he seized upon a principle or argument, apparently presented in the most elementary form, and showed it to be a mere corollary of some more general truth which lay at immeasurable distances beyond it. If his mind had been less practical he would have been the most consummate of metaphysicians and the most skilful of sophists. But his love of dialectics was constantly controlled by his superior love of truth. He had no vain ambition to darken counsel or encourage doubt. His aim was conscientiously to unfold truth, as it was, in its simple majesty; to strengthen the foundation of moral, religious, social, political and legal obligations; and to employ the gifts with which Providence had intrusted him to augment human happiness, support human justice and bind together in an indissoluble union the great interests of human society. In short, if I were called upon to say in what he intellectually excelled most men I should say it was in wisdom, in the sense already alluded to; — a wisdom drawn from large, extensive, sound principles and various researches; — a wisdom which constantly accumulated new materials for thought and action and as constantly sifted and refined the old. He was

not ambitious of literary distinction. But his great work on the life of Washington shows his capacity for historical composition in the most favorable light. It will forever remain a monument of his skill, sound judgment and strict impartiality; and must in the future, as in the past, be a standard authority for all other historians.

In contemplating his professional career it cannot for a moment be doubted that he must have occupied the foremost rank among advocates. Such accordingly has been his reputation transmitted to us by his contemporaries at the bar. From what has been already said his powers of argument must have ensured him entire success. In his manner he was earnest, impressive, deliberative; but at the same time far more intent on his matter than his manner. Never having known him while he was at the bar I should have silently drawn the conclusion that his forensic arguments were more distinguished for masculine sense, solid reasoning and forcible illustration than for impassioned appeals or touching pathos, even when the latter might fairly enlist the judgment of an advocate. But there have been times in private conversations and conferences in which he has been roused by the interest of the subject to such a glowing strain of animated reasoning that I am convinced that he was no stranger to appeals to the heart; and that when he chose he could call up from the very depths of the soul its most powerful feelings.

In regard to eloquence, if by that be merely meant an ornamented diction, splendor of style, impassioned delivery and fine flourishes of rhetoric, it could scarcely be said to belong to his forensic addresses. In the view of such a mind as his there were graver duties to be performed and more important interests to be secured. He loved the law as a science and not as a trade; and felt the full dignity of being a minister at its altars. He deemed himself under deep responsibility, not to his client alone, but to the court and to the cause of public justice. He studied to know what the precepts of the law were, that he might apply them to his cause, and not to pervert them to aid the triumph of injustice, or to swell the trophies of cunning, or avarice, or profligacy. His notions of professional morals and obligations were

far different from such mean and debasing palterings with conscience. He argued *for* the law, and *with* the law, and *from* the law. He disdained to mislead the court or jury, if he could; and he gave to both on all occasions the support and the instruction of his ample studies.

But if by eloquence be meant the power to address other men's minds in language expressive and luminous; to present the proper topics of argument in their just order and fulness; to convince the understanding by earnest and sententious appeals; and, by the force of reasoning, to disarm prejudices, to subdue passions, and to dissipate popular delusions,—if these be the attributes of eloquence, then, indeed, few men might more justly aspire to such a distinction. I would not claim for him that he possessed the power to seduce men's understandings by persuasive insinuations or honeyed accents; but I affirm that he withdrew their understandings from the potency of such artifices, so that they fell lifeless at his feet — *telumque imbellis sine ictu*. To him may unhesitatingly be applied the language of Cicero, pronounced upon one of the greatest lawyers of Rome, that he possessed a mastery of the highest art of oratory — the art of analyzing defining and illustrating a subject, separating the true from the false, and deducing from each the appropriate consequences — *artem, quæ doceret rem universam tribuere in partes, latentem explicare definiendo, obscuram explanare interpretando; ambigua primum videre, deinde distinguere; postremo, habere regulam, quæ vera et falsa judicaretur; et quæ, quibus positæ, essent, quæque non essent, consequentia. Ille enim attulit hanc artem, omnium artium maximam, quasi lucem, ad eam, quæ confuse ab aliis aut respondebantur, aut agebantur*.<sup>1</sup>

But it is principally upon his character as a magistrate, presiding over the highest tribunal of the nation, that the solid fabric of his fame must rest. And there let it rest, for the foundations are deep and the superstructure fitted for immortality. Time, which is perpetually hurrying into a common oblivion the flatterers of kings and the flatterers of the people, the selfish demagogues and the wary courtiers, serves but to make true greatness

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<sup>1</sup> Cicero De Clar. Orator., cap. 14.



better known, by dissolving the mists of prejudice and passion which for a while conceal its true glory. The life of the Chief Justice extended over a space rare in the annals of jurisprudence; and still more rare is such a life with the accompaniment of increasing reputation. There was nothing accidental or adventitious in his judicial character. It grew by its own native strength, unaided by the sunshine of power, and unchecked by cold neglect or unsparing indifference. The life of Lord Mansfield was one of the longest and most splendid in the juridical history of England. That of the Chief Justice was longer and may fairly rival it in the variety of its labors, in the glory of its achievements, and in its rapid advancement of the science of jurisprudence.

The Chief Justiceship of the United States is a station full of perplexing duties and delicate responsibilities, and requiring qualities so various, as well as so high, that no man, conscious of human infirmity, can fail to approach it with extreme diffidence and distrust of his own competency. It is the very post where weakness and ignorance and timidity must instantly betray themselves and sink to their natural level. It is difficult even for the profession at large fully to appreciate the extent of the labors, the various attainments, the consummate learning and the exquisite combination of moral qualities which are demanded to fill it worthily. It has hitherto been occupied only by the highest class of minds, which had been trained and disciplined by a long course of public and professional service for its functions. Jay, Ellsworth and Marshall have been the incumbents for the whole period since the adoption of the Constitution, and their extraordinary endowments have in a great measure concealed from the public gaze the dangers and the difficulties of this dazzling vocation.

There is nothing in the jurisprudence of the States which affords any parallel or measure of the labors of the National courts. The jurisprudence of each State is homogeneous in its materials. It deals with institutions of a uniform character. It discusses questions of a nature familiar to the thoughts and employments of the whole profession. The learned advocate who finds himself transferred, by public favor or superior ability, from the



State bar to the State bench, finds the duties neither new nor embarrassing in their elements or details. He passes over ground where the pathways are known and measured; and he finds pleasure in retracing their windings and their passages. He may exclaim with the poet, *Juvat iterare labores*; and he indulges a safe and generous confidence in his own juridical attainments.

How different is the case in the National courts! With whatever affluence of learning a judge may come there, he finds himself at once in a scene full of distressing novelties and varieties of thought. Instead of the jurisprudence of a single State, in which he has been educated and trained, he is at once plunged into the jurisprudence of twenty-four States, essentially differing in habits, laws, institutions and principles of decision. He is compelled to become a student of doctrines to which he has hitherto been an entire stranger; and the very language in which those doctrines are sometimes expressed is in the truest sense to him an unknown tongue. The words seem to belong to the dialect of his native language; but other meanings are attached to them, either so new, or so qualified, that he is embarrassed at every step of his progress. Nay, he is required in some measure to forget in one cause what he has learned in another, from its inapplicability or local impropriety; and new statutes, perpetually accumulating on every side, seem to snatch from his grasp the principles of local law at the moment when he is beginning to congratulate himself upon the possession of them. Independent of this complicated intermixture of State jurisprudence, he is compelled to master the whole extent of admiralty and prize law; the public and private law of nations; and the varieties of English and American equity jurisprudence. To these confessedly herculean labors he must now add some reasonable knowledge of the Civil Law, and of the jurisprudence of France and Spain, as they break upon him from the sunny regions of the farthest south. Nor is this all (though much of what has been already stated must be new to his thoughts); he must gather up the positive regulations of the statutes and treaties of the National Government, and the silent and implied results of its sovereignty and action. He must finally expand his studies

to that most important branch of national jurisprudence, the exposition of constitutional law, demanding, as it does, a comprehensiveness of thought, a calmness of judgment and a diligence of research (not to speak of other qualities) which cannot be contemplated without the most anxious apprehensions of failure. When these various duties are considered, it is scarcely too much to say that they present the same discouraging aspect of the national jurisprudence which Sir Henry Spelman has so feelingly proclaimed of the municipal jurisprudence of England, in his day: — *Molem, non ingentem solum, sed perpetuis humeris sustinendam.*

These, however, are but a part of the qualifications required of the man who holds the office of Chief Justice. He must also possess other rare accomplishments, which are required of one who, as the head of the court, is to preside over its public deliberations and its private confidential conferences. Patience, moderation, candor, urbanity, quickness of perception, dignity of deportment, gentleness of manners, genius which commands respect, and learning which justifies confidence, — these seem indispensable qualifications to fill up the outlines of the character. While I was yet shadowing them out in my own mind, my eyes insensibly turned (as it were) to the Judicial Hall at Washington, and to the very chair appropriated to the office. The venerable form of Marshall seemed still seated there! It was but a momentary dream; I awoke; and found that I had but sketched the first lines of his portrait.

Yes, this great and good man was all that we could ask or even desire for the station. He seemed the very personation of justice itself, as he ministered at its altars — in the presence of the nation — within the very walls which had often echoed back the unsurpassed eloquence of the dead, of Dexter, and Pinkney, and Emmet, and Wirt, and of the living also, nameless here, but whose names will swell on the voices of a thousand generations. Enter but that hall, and you saw him listening with a quiet, easy dignity to the discussions at the bar; silent, serious, searching, with a keenness of thought, which sophistry could not mislead, or error confuse, or ingenuity delude, with a benignity of aspect which invited the

modest to move on with confidence; with a conscious firmness of purpose which repressed arrogance and over-awed declamation. You heard him pronounce the opinion of the court in a low but modulated voice, unfolding in luminous order every topic of argument, trying its strength, and measuring its value, until you felt yourself in the presence of the very oracle of the law. You heard (if I may adopt the language applied to another great magistrate on a like occasion), you "heard principles stated, reasoned upon, enlarged and explained, until you were lost in admiration at the strength and stretch of the human understanding."<sup>1</sup> Follow him into the conference room, a scene of not less difficult or delicate duties, and you would observe the same presiding genius, the same kindness, attentiveness and deference; and yet, when the occasion required, the same power of illustration, the same minuteness of research, the same severity of logic, and the same untiring accuracy in facts and principles.

It may be truly said of him, as it was of Lord Mansfield, that he excelled in the statement of a case; so much so that it was almost of itself an argument. If it did not at once lead the hearer to the proper conclusion, it prepared him to assent to it as soon as it was announced. Nay, more; it persuaded him that it must be right, however repugnant it might be to his preconceived notions. Perhaps no judge ever excelled him in the capacity to hold a legal proposition before the eyes of others in such various forms and colors. It seemed a pleasure to him to cast the darkest shades of objection over it, that he might show how they could be dissipated by a single glance of light. He would by the most subtle analysis resolve every argument into its ultimate principles, and then with a marvelous facility apply them to the decision of the cause.

That he possessed an uncommon share of juridical learning would naturally be presumed from his large experience and inexhaustible diligence. Yet it is due to truth as well as to his memory to declare that his juridical learning was not equal to that of many of the great

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<sup>1</sup> Mr. Justice Buller, speaking of Lord Mansfield, in *Lickbarrow v. Mason*, 2 Term Rep. 73.

masters in the profession, living or dead, at home or abroad. He yielded at once to their superiority of knowledge, as well in the modern as in the ancient law. He adopted the notion of Lord Bacon, that "studies serve for delight, for ornament, and for ability," — "in the judgment and disposition of business." The latter was his favorite object. Hence he "read not to contradict and confute; nor to believe and take for granted; nor to find talk and discourse; but to weigh and consider." And he followed another suggestion of that great man, that "judges ought to be more learned than witty; more reverend than plausible; and more advised than confident." The original bias, as well as the choice, of his mind was to general principles and comprehensive views, rather than to technical or recondite learning. He loved to expatiate upon the theory of equity; to gather up the expansive doctrines of commercial jurisprudence; and to give a rational cast even to the most subtile dogmas of the common law. He was solicitous to hear arguments, and not to decide causes without them. And no judge ever profited more by them. No matter whether the subject was new or old; familiar to his thoughts or remote from them; buried under a mass of obsolete learning, or developed for the first time yesterday, — whatever was its nature, he courted argument, nay, he demanded it. It was matter of surprise to see how easily he grasped the leading principles of a case, and cleared it of all its accidental incumbrances; how readily he evolved the true points of the controversy, even when it was manifest that he never before had caught even a glimpse of the learning upon which it depended. He seized, as it were by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities as if the very minds of the judges themselves stood disembodied before him.

But his peculiar triumph was in the exposition of constitutional law. It was here that he stood confessedly without a rival, whether we regard his thorough knowledge of our civil and political history, his admirable powers of illustration and generalization, his scrupulous integrity and exactness in interpretation, or his consummate skill in moulding his own genius into its elements as if



they had constituted the exclusive study of his life. His proudest epitaph may be written in a single line — Here lies the Expounder of the Constitution of the United States.

I am aware of the force of this language and have no desire to qualify it. The task which he had to perform was far different from that which belongs to the debates in other places, where topics may be chosen, and pressed or avoided as the occasion may require. In the forum there is no choice of topics to be urged, there are no passions to be addressed, there are no interests to be courted. Critical inquiries, nice discriminations, severe inductions and progressive demonstrations are demanded upon the very points on which the controversy hinges. Every objection must be met and sifted and answered, not by single flashes of thought, but by the closest logic, reasoning out every successive position with a copious and convincing accuracy.

Let it be remembered that, when Chief Justice Marshall first took his seat on the bench, scarcely more than two or three questions of constitutional law had ever engaged the attention of the Supreme Court. As a science constitutional law was then confessedly new; and that portion of it, in an especial manner, which may be subjected to judicial scrutiny, had been explored by few minds, even in the most general forms of inquiry. Let it be remembered that in the course of his judicial life, numerous questions of a practical nature, and involving interests of vast magnitude, have been constantly before the court, where there was neither guide nor authority, but all was to be wrought out by general principles. Let it be remembered that texts, which scarcely cover the breadth of a finger, have been since interpreted, explained, limited and adjusted by judicial commentaries which are now expanded into volumes. Let it be remembered that the highest learning, genius and eloquence of the bar have been employed to raise doubts and fortify objections; that State sovereignties have stood impeached in their legislation; and rights of the most momentous nature have been suspended upon the issue; that under such circumstances the infirmities of false reasoning, the glosses of popular appeal, the scattered fire of irregular and in-



conclusive assertion, and the want of comprehensive powers of analysis, had no chance to escape the instant detection of the profession. Let these things (I say) be remembered; and who does not at once perceive that the task of expounding the Constitution, under such circumstances, required almost superhuman abilities? It demanded a mind in which vast reaches of thought should be combined with patience of investigation, sobriety of judgment, fearlessness of consequences and mastery of the principles of interpretation, to an extent rarely belonging to the most gifted of our race.

How this gigantic task of expounding the Constitution was met and executed by Chief Justice Marshall, let the profession, let the public decide. Situated as I am, I may not speak for others upon such an occasion. But having sat by his side during twenty-four years; having witnessed his various constitutional labors; having heard many of those exquisite judgments, the fruits of his own unassisted meditations, from which the court has derived so much honor — *et nos aliquod nomenque decusque gessimus*, — I confess myself unable to find language sufficiently expressive of my admiration and reverence of his transcendent genius. While I have followed his footsteps, not as I could have wished, but as I have been able, at humble distances, in his splendid judicial career, I have constantly felt the liveliest gratitude to that beneficent Providence which created him for the age that his talents might illustrate the law, his virtues adorn the bench and his judgments establish the perpetuity of the Constitution of the country. Such is my humble tribute to his memory. *His saltem accumulem donis, et fungar inani munere*. The praise is sincere, though it may be perishable. Not so his fame. It will flow on to the most distant ages. Even if the Constitution of his country should perish, his glorious judgments will still remain to instruct mankind, until liberty shall cease to be a blessing, and the science of jurisprudence shall vanish from the catalogue of human pursuits.

And this great magistrate is now gone — gone, as we trust, to the high rewards of such eminent services. It is impossible to reflect that the places which once knew him shall know him no more, without a sense of inexpress-

sible melancholy. When shall we look upon his like again? When may we again hope to see so much moderation with so much firmness; so much sagacity with so much modesty; so much learning with so much purity; so much wisdom with so much gentleness; so much splendor of talent with so much benevolence; so much of everything to love and admire, with nothing, absolutely nothing, to regret?

And yet there are some consolations even in so great a loss. Cicero, in mourning over the death of his friend, the great Roman lawyer, Hortensius, did not hesitate to pronounce his death fortunate, for he died at a moment happy for himself, though most unfortunate for his country. *Quoniam perpetuâ quâdam felicitate usus ille, cessit e vitâ, suo, magis quam suorum civium, tempore. Vivit tam diu quam licuit in civitate bene beateque vivere.*<sup>1</sup> We may well apply the like remark to Chief Justice Marshall. He was not cut off in the middle life, in the early maturity of his faculties, while he was yet meditating new plans of usefulness or glory. He lived to the very verge of that green old age, after which the physical strength sensibly declines, and the intellectual powers no longer reach their accustomed limits. He retained to the very last hour of his life the possession of all these powers in full perfection, without change — nay, without the shadow of change. Such had been his hope, earnestly and frequently expressed to his confidential friends, with deep solicitude; for no man more than he dreaded to add another to the melancholy lessons:

“In life's last scenes, what prodigies surprise,  
Tears of the brave, and follies of the wise.”

We may well rejoice, therefore, that life so long and so useful should have come to its close without any exhibition of human infirmity. The past is now secure. It is beyond the reach of accident. The future cannot be disturbed by error, or darkened by imbecility. His setting sun loomed out in cloudless splendor as it sunk below the horizon. The last lights shot up with a soft and balmy transparency, as if the beams, while yet reflected back on this world, were but ushering in the morn of his own immortality.

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<sup>1</sup> Cicero De Clar. Orator., cap. 1.

### III.

#### Address Before the American Bar Association, 1879, by Edward J. Phelps.<sup>1</sup>

This famous address, so often quoted and referred to on Marshall Day, was delivered at the second meeting of the American Bar Association at Saratoga Springs, New York, in 1879, under the circumstances stated by Mr. Phelps in the address itself, and it is included in the present work for the reasons given in the Introduction.

The Editor who was present has never forgotten and can never forget the delight and surprise of the assembled Bar at what they one and all regarded as an almost unequaled exhibition of intellectual and oratorical powers. While undoubtedly it was not improvised, still it was not memorized, but delivered extemporaneously from short notes, verbatim as it now appears, with all the felicity of diction and graces of oratory for which Mr. Phelps was eminently distinguished. Gradually he unveiled Marshall to our view, and when he had finished, the great Chief Justice stood before us, colossal, majestic, robed and peerless — stood fittingly before us in severe and classic beauty like a statue by Pheidias of one of the

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<sup>1</sup> Mr. Phelps's address was published by the American Bar Association with the following title-page: "Chief Justice Marshall and the Constitutional Law of his Time. An Address before the American Bar Association at Saratoga, August 21, 1879, by E. J. Phelps. Reported by J. H. Mimms, Stenographer. Philadelphia: E. C. Markley & Son, No. 422 Library Street. 1879."

Immortal Gods. Undoubtedly this address had not a little to do in inspiring the Marshall revival celebrated in 1901.

Mr. Phelps on his return from England resumed the practice of his profession, and not long before his death it chanced that after the argument of an important cause in the Supreme Court,<sup>1</sup> we fared home together, and until near midnight we talked and talked as lawyers are wont to do about the Court, its judges, its history, its future, and finally parted, as all must part, sooner or later, never to meet again. In his long and honorable career he failed in only one duty to his profession,— he might have become Marshall's biographer.

The occasion of here republishing Mr. Phelps's address has recalled vividly these personal recollections of its delivery, of its author and of our long-time friendship; these the Editor hopes will be regarded as a sufficient justification for a departure from the rule prescribed to himself, not to offer comments upon the addresses which are contained in the present work.

Mr. Phelps announced his subject as Chief Justice Marshall and the Constitutional Law of his Time, and he spoke as follows:

MR. PRESIDENT AND GENTLEMEN OF THE ASSOCIATION:— I had hoped to have offered you, this morning, what you may perhaps regard as due to the occasion — a written address. Circumstances not foreseen when I accepted the invitation of your committee have placed that preparation out of my power, and have reduced me to the necessity either of appearing before you without it or not appearing at all. I should have accepted the latter alternative if I had felt myself quite at liberty to disre-

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<sup>1</sup> Trans-Missouri Freight Association Case, 166 U. S. 290 (1896).



gard such an engagement, and if I had not felt so much solicitude for the success of this our first annual meeting, that I was reluctant to have any of its announcements fail. It seems to me that if these meetings are to succeed we should regard such invitations somewhat as politicians profess to regard nominations for the Presidency: not supposed to be sought, but not under any circumstances whatever to be declined.

Allow me one word further on this subject. While we shall always listen, I am sure, with greater pleasure and advantage to the elaborate preparation that produces such admirable papers as we heard yesterday, in the address and the essays that were read to us, I hope that the precedent will not be established among us that such preparation is indispensable. We all know how difficult in our busy lives it is, at all times, to command it. I trust, therefore, we shall always feel at liberty, when we are fortunate enough to have anything to say, and to be asked to say it, to address each other in the simple, unpremeditated style that prevails in courts of justice. In other words, if gentlemen cannot always redeem their obligations in gold, let us have the silver, even at ninety-two cents on the dollar; it is much better than total repudiation.

I shall ask your attention to some observations, more desultory than I hoped to make them, on the subject of Chief Justice Marshall and the constitutional law of his time.

If Marshall had been only what I suppose all the world admits he was, a great lawyer and a very great judge, his life, after all, might have had no greater historical significance, in the strict sense of the term, than the lives of many other illustrious Americans who in their day and generation have served and adorned their country.

A soldier of the Revolution—the companion and friend of Washington, as afterwards his complete and elegant biographer—greatly distinguished at the bar and in the public service before he became Chief Justice—and then presiding in that capacity for so long a time, with such extraordinary ability, with such unprecedented success,—if the field of his labors had been only



the ordinary field of elevated judicial duty, his life would still have been, in my judgment, one of the most cherished memories of our profession and best worthy to be had in perpetual remembrance. Pinkney summed up his whole character when he declared that Marshall was born to be the Chief Justice of whatever country his lot might happen to be cast in. He stood pre-eminent and unrivaled, as well upon the unanimous testimony of his great contemporaries as by the whole subsequent judgment of his countrymen. The best judicial fruit our profession has produced.

Another interest, less important, but perhaps to the lawyer who dwells upon the history of his profession more fascinating, attaches to the life of Marshall. He was the central figure—the cynosure—in what may well be called the Augustan age of the American bar; golden in its jurisprudence, golden in those charged with its service and sharing in its administration. We cannot expect, since change is the law of systems as well as of individuals and of all human affairs, we can never expect to see hereafter, a jurisprudence so simple, so salutary, so elevated, so beneficent, as the jurisprudence of those days. Perplexed as the law has become with infinite legislation, confused and distracted with a multitude of incongruous and inconsistent precedents that no man can number, it is a different system now, although still the same in name, from that which Marshall dealt with. And it is no disparagement to the bar of our day—and no man esteems its ability and character higher than I do—to say that we can hardly hope to behold again such a circle of advocates, displayed upon a stage at once distinctive and conspicuous, as gathered round the tribunal over which the great Chief Justice presided. The Livingstons, Emmet, Oakley, Dexter, Webster, Pinkney, Wirt, Sergeant, Binney, Hopkinson, Dallas—no need to name them all; their names are household words among lawyers. Well may it be said of them, “The dew of their birth was of the womb of the morning;” the morning of this country; the morning of republican government; the morning of American law, of American prosperity, of American peace. It is sad to remember, what we all have to remember, how

largely the fame of such men rests in tradition; how much of it is *in pais* and how little on the record. It is the fate of the advocate. However important his labors, or brilliant his talents, they are expended for the most part upon transitory affairs — the concerns that perish; the controversies that pass away. Like the actor, he has his brief and busy hour upon the stage, but his audience is of the hour, his applause of the moment. When the curtain falls and he is with us no longer, very little remains of all his exertions. Even the memory of them perishes when the witnesses are gone.

But it is not, in my judgment, as a great judge merely, or in comparison with other great judges, that Chief Justice Marshall will have his place in ultimate history. The test of historical greatness — the sort of greatness that becomes important in future history — is not great ability merely. It is great ability combined with great opportunity, greatly employed. The question will be how much a man did to shape the course of human affairs or to mould the character of human thought. Did he make history, or did he only accompany and embellish it? Did he shape destiny, or was he carried along by destiny? These are the inquiries that posterity will address to every name that challenges permanent admiration or seeks a place in final history. Now it is precisely in that point of view, as it appears to me, and I venture to present the suggestion to your better consideration, that adequate justice has not yet been done to Chief Justice Marshall. He has been estimated as the lawyer and the judge, without proper consideration of how much more he accomplished, and how much more is due to him from his country and the world than can ever be due to any mere lawyer or judge. The assertion may perhaps be regarded as a strong one, but I believe it will bear the test of reflection, and certainly the test of reading in American history, that, practically speaking, we are indebted to Chief Justice Marshall for the American Constitution. I do not mean the authorship of it, or the adoption of it — although in that he had a considerable share — but for that practical construction, that wise and far-seeing administration, which raised it from a doubtful experiment, adopted with great hesita-

tion, and likely to be readily abandoned if its practical working had not been successful — raised it, I say, from a doubtful experiment to a harmonious, a permanent and a beneficent system of government, sustained by the judgment and established in the affection of the people. He was not the commentator upon American constitutional law; he was not the expounder of it; he was the author, the creator of it. The future Hallam, who shall sit down with patient study to trace and elucidate the constitutional history of this country — to follow it from its origin, through its experimental period and its growth to its perfection; to pursue it from its cradle, not, I trust, to its grave, but rather to its immortality — will find it all, for its first half century, in those luminous judgments in which Marshall, with an unanswerable logic and a pen of light, laid before the world the conclusions of his court. It is all there, and there it will be found and studied by future generations. The life of Marshall was itself the constitutional history of the country from 1801 to 1835.

It is difficult for us at this time to comprehend the obstacles that attended the original construction and practical administration of the Constitution. Since the way through them has been pointed out by the labors of that court, since experience has justified and established those propositions, they seem very plain and clear. Starting from our point of view, and going backward, we can hardly appreciate the embarrassments that attended them in the outset. But the student of history will discover, the lawyer who attends to the growth as well as the learning of his profession will never forget, the discouragements that surrounded that subject when it was first taken in hand. A Constitution adopted with great opposition, the subject of the gravest difference of opinion among the wisest men on its most material points; quite likely to fail, as its predecessor the Articles of Confederation had failed; the object of a heated party spirit and a bitter political controversy; it not only demanded the highest order of judicial treatment, but such as could be reconciled to the universal judgment of the country. Popular opinion is a matter with which independent tribunals have usually but little concern. But in this case

it became as vital as the law itself, because no Constitution could stand that proved repugnant to the general sense.

The field was absolutely untried. Never before had there been such a science in the world as the law of a written constitution of government. There were no precedents. Courts of justice sit usually to determine the existing law, in the light of authoritative precedents, and statutes. Originality is neither expected nor tolerated. A magistrate who should bring much original invention to bear in expounding the law would be apt to prove one of those questionable blessings that "brighten only when they take their flight." An original field of judicial exertion very rarely offers itself. To no other judge, so far as I know, has it ever been presented, except to Mansfield, in the establishment of the commercial law; unless perhaps the remark may be extended to the labors of Lord Stowell, in the department of English consistorial law, and to those of Lord Hardwicke in equity. Those are the only instances that the long history of our profession under the common law offers, of what may be called an original field of judicial labor.

Such was the task that addressed itself, when Marshall took his seat upon the bench, to the court over which he presided. A task of momentous importance — fraught with infinite difficulty — in a field without precedent — and under the most peculiar and critical circumstances.

It is a singular fact, that although the Supreme Court had been in existence twelve years before 1801, when Marshall was appointed, and though three Chief Justices with brief terms of office had preceded him, only two decisions of that court had been made on the subject of constitutional law, — the case of *Hylton* against the United States, which affirmed the validity of a tax upon carriages laid by the State of Virginia, and the case of *Calder* against Bull, in which it was held that an act of the Legislature of the State of Connecticut, granting a new trial in a civil action, was not in contravention of any provision of the Constitution of the United States. Those were the only questions previously decided in respect to the American Constitution. Between that time and 1835, when Marshall died, fifty-one decisions will be found to



have been made and reported by that court on the subject of the law of the Federal Constitution. In thirty-four of those cases the opinion was delivered by the Chief Justice; being twice as many opinions as were delivered on that subject by all the other members of the court together.

I have spoken of this great work as the work of the Chief Justice — not unmindful certainly of his eminent associates, and especially of Judge Story, who sat with him during a considerable portion of that time. And I take leave to refer to the testimony of Judge Story, lest some may think I have gone too far in attributing the merit of this system of law so largely to Chief Justice Marshall. Judge Story is perhaps the best witness who can testify on that point, because his means of knowledge were complete. He was not likely to undervalue or disparage the labors of his associates, nor entirely to overlook his own very valuable efforts in that branch of the law. He says, in an article contributed to the *North American Review*, "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say of Chief Justice Marshall. For though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made in which he has not delivered the opinion of the court; and in those few the duty devolved upon others to their own regret, either because he did not sit in the case or from motives of delicacy abstained from taking an active part."

It is to be remembered further that in only one of all those decisions did the majority of the court fail to concur with Marshall. In the case of *Ogden v. Saunders* — where the power of the States to pass bankrupt or insolvent laws was discussed, he was for the first and last time in the minority. Four of the judges — against the opin-



ion of Judges Marshall, Story and Duvall -- sustained the power of the States to pass such a law; but all concurred in the judgment in that case, which was that a discharge under such a law could not affect a creditor outside the jurisdiction who had not thought proper to appear and become a party to the proceeding. I need hardly say to an assemblage of lawyers that as the half century that has passed away since most of those decisions were rendered has completely established and confirmed and rendered plainer and plainer the soundness and the wisdom of the law they involve, so experience has likewise shown that in this solitary instance in which his opinion was rejected the Chief Justice was right. He correctly anticipated, with a far-reaching sagacity, what would be the result of a system of insolvency that discharges a debtor in one State and fails to discharge him in another; that pays one creditor who is within the State and fails to pay another who is without it. And he clearly perceived that if that great power was to be reposed at all in the Federal Government, as it is, and of necessity must be, it ought to be an exclusive power. There is the only and mistaken instance in which his judgment on a constitutional question did not become the law of the land.

And therefore it is to be said, without injustice to his associates, and without injustice to those great lawyers to whom I have alluded, and whose genius and labors were contributed to build up this system of law, that the value and the credit of it, the authorship and creation of it, are principally due to Marshall. And I believe it will be seen in future history, that as Washington brought this people through the Revolution to a period when they were able to have a Constitution of their own, so Marshall carried the Constitution through that experimental period which settled the question whether it should stand or fall. If this country has profited, and if through this country the world has profited, by the raising of an instrument doubtless the most important since *Magna Charta*, couched necessarily and wisely to a large degree in generalities, into the beneficent government under which we live, it is more largely due to Chief Justice Marshall than to any other man, or perhaps to all other

men, who ever had anything to do with it. That is my proposition. Of course if the Revolution had failed, it is not probable we should always have continued to be colonies of Great Britain. Some other leader, in some other rebellion, might have carried us through to a condition of independence. If this Constitution had perished, republican government might not have perished. Some other tribunal, under some other Constitution, might perhaps have reconstructed it. But taking history as it stands—dealing with the Constitution under which we live, and not entering upon the vain conjecture of what might have been the consequences if that Constitution had fallen, certainly the success of the experiment of republican government may be said to be mainly due to Marshall.

When those celebrated judgments were rendered, the questions involved were set at rest. Even party and partisan spirit was hushed. They passed by universal consent and without any further criticism, into the fundamental law of the land, axioms of the law, no more to be disputed. Time has demonstrated their wisdom. They have remained unchanged, unquestioned, unchallenged. All the subsequent labors of that high tribunal on the subject of constitutional law have been founded on, and have at least professed and attempted to follow them. There they remain. They will always remain. They will stand as long as the Constitution stands. And if that should perish, they would still remain, to display to the world the principles upon which it rose, and by the disregard of which it fell.

Let me say here in passing that the service ought to be rendered to the history and literature, to say nothing of the constitutional law of the country, of bringing these opinions together in some compilation that should make them accessible to the general student, as well as to the lawyer. They are scattered, as you know, through some twenty-five volumes of reports, practically inaccessible to readers outside the profession. They are known only through a vague reputation, except to the profession, and not perhaps so completely understood by all the profession as could be desired, if we may judge from some of the recent discussions upon the subject. If they could

be brought together, not merely as the repository of the foundation stones of the fundamental law of the land, but likewise as among the highest models of logic and reason and the purest specimens of judicial style, it would be a contribution to American letters and history that would be valuable and permanent.<sup>1</sup>

I do not propose, as you may well imagine, to enter into any discussion on questions of constitutional law. But a few words may be pardoned in respect to the means and the manner by which the result I have spoken of was achieved; and not only achieved, but rendered so perfectly satisfactory to the whole body of the American people. It seems to me that it all turned upon one cardinal point, and a point which I shall venture to suggest needs to be more frequently recurred to and more clearly understood. And that is, that the construction of the Constitution of the United States, for all purposes for which it requires construction, belongs everywhere and always to the jurisprudence of the country, and not to its politics, or even to its statesmanship. The lawyer or the student who shall set himself down to follow the labors of that great tribunal from beginning to end, to learn on what foundation they rested, and what was the guide through the maze that proved as unerring as the mariner's compass in the storm, will find it in that salutary principle, set forth with the utmost clearness and unanswerable force in the early case of *Marbury against Madison*, followed up from time to time by repeated decisions, and adopted by all jurists and all courts ever since, that the Constitution of this country has, by an inevitable necessity, reposed in the judicial department of the government the sole determination and construction of the fundamental law of the land. In England, whence our institutions were mainly derived, Parliament is omnipotent. It is the tribunal charged with the administration of the unwritten British Constitution. Their action in that sphere is final. Any statute they deem it proper

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<sup>1</sup> The publishers of these volumes have just arranged to reprint, uniform with the present work, an edition of "*Marshall's Constitutional Decisions*" annotated by George S. Clay and John M. Dillon of the New York Bar, under the supervision of the present Editor.

to pass is a valid statute and controls all rights, public and private. The American Constitution is based upon a different theory. That difference, as it seems to me, is the distinguishing and almost the only vital difference from the Constitution of Great Britain. The mere machinery of the administration of the government, the manner in which the Chief Magistrate shall be elected — the term of his office — the appointment of his subordinates — these and other details are subject to change, as time and experience shall point out. They are not essential to our system. It is not upon these that republican government reposes. It is, I say — and I repeat in order to emphasize more clearly the proposition I desire to present — it is upon the entrusting to the judicial department of the whole subject of the constitutional law, for all purposes, that our government rests. While that stands and is maintained in its purity, this Constitution will stand. The ship will ride as long as the anchor holds, though storm after storm may sweep across the face of the sea. While that remains, the system will remain. Details may be modified and changed, we cannot foresee to what extent. Changes of that sort have already taken place, but the principle I have stated is the fundamental idea.

That point once established by the court, the simple, the ancient, the salutary, the perfectly intelligible and just principles of the common law, became sufficient for all the purposes of constitutional construction. When the rule of construction of the great compact was shown to be simply a question of law, the law was found perfectly adequate to dispose of it.

No better illustration can be produced in history of the profound wisdom of that system of jurisprudence known as the common law than to observe how completely those rules that are applied to the humblest contract, between the obscurest individuals, were found sufficient for the emergency when a court of justice was called upon for the first time in the history of the world, not merely to adjudicate upon private rights, but to promulgate from the bench the principles of civil government, and to adjust the rights and powers of conflicting sovereignties. If the eulogian of the common law seeks



for the most signal illustration of its comprehensiveness, he will find it there. It was by the application to the Constitution of those plain and clear rules that all the results of its construction were satisfactorily worked out.

When we peruse those judgments we are reminded, especially and above all, how absolutely free they are from all considerations of political expediency, all motives of party politics, all State craft, or even statesmanship, unless it may be deemed the highest statesmanship to avoid the attempt at statesmanship in judicial construction, and not to confound two very different systems of administration, belonging to two very different tribunals. How perfectly free from all suspicion of party or political bias or feeling those decisions stand! And that, as it appears to me, is one reason why they were accepted by the universal consent of the American people, and have always remained without question or dispute. No political party ever yet convinced its adversaries by argument. Discussion only intensifies the dispute; harmony with a political opponent is only obtained by the exercise of the courtesy which suspends all discussion on the points of difference. No living man could have addressed to the American people, in that first critical half century of the republic, a constitutional argument based upon party politics that would have stood an hour. It would have been universally rejected; denied by its opponents, despised by its friends. Marshall, as it is well known, was a Federalist. His political opinions were doubtless pronounced and decided. It was not because he was without political sentiments that he excluded them from his court. The Federal party, I may be permitted to observe in passing, will perhaps receive better justice from future history than it has from the past. It went to final wreck about the time of the last war with Great Britain, encountering the usual fate of a party which sets itself in opposition to any war it may be proposed to engage in. But I believe the ultimate justice will be done it, of remembering that some of the greatest and purest men this country ever contained were the founders and leaders of that much abused party. Their views have been generally misconceived. It was not upon the construction of the Constitution we have that



they differed from their opponents, but upon the previous question whether we should have that Constitution or some other. It is idle to busy ourselves with conjectures of what might, would or could have been the history of this country, if the Constitution which Washington, Hamilton, Jay, and doubtless Marshall preferred, had been adopted, because it was not adopted. But Federalist as he was, and whatever may be said of his party or their views, we can find no more trace in any line of those great judgments that would indicate the political sentiments or bias of the Chief Justice than if we were to study his opinions upon charter-parties or policies of insurance.

Let me quote on this subject some very forcible and apposite language from the resolutions adopted by the Charleston Bar (I know not who was the author<sup>1</sup>) on the occasion of Chief Justice Marshall's death: "Even the spirit of party respected the unsullied purity of the judge, and the fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom with the independence of the judiciary."

As every lawyer and every intelligent layman knows, the point of most danger and difficulty in constitutional construction, where the greatest risk of final shipwreck is incurred, is in the attempt to adjust those conflicting — sometimes doubtful — always very delicate — relative rights of the States and the Federal Government. That point of all others was treated by the court with the largest sagacity and the greatest wisdom. Critical as were many of the emergencies that arose in those days out of that subject, they were all not only satisfactorily met, but buried and forgotten forever, under the wise and salutary administration of the law which they encountered.

Upon the distinction, so much and so long discussed in some parts of our country, between strict construction and liberal construction in respect to these relative rights, it was the view of the Chief Justice and his associates that they were unable to perceive what those words meant in that connection, or what just application they

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<sup>1</sup> Stated by Gen. Lawton, of Georgia, to have been written by Mr. Petigru.

had. The court had simply to ascertain the meaning of a written instrument, which upon common principles was to be construed both strictly and liberally; strictly in ascertaining what powers it contains, liberally in carrying into effect those powers it is found to contain.

Allow me in taking leave of this point to read a few words from the language of the Chief Justice himself, out of much that might be usefully quoted did time allow: "In the argument," says he, "we have been admonished of the jealousy with which the States of the Union view a revising power intrusted by the Constitution and laws of the United States to this tribunal. To observations of this character, the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never we trust shrink from the exercise of that which is conferred upon us." Words which are fit to be written in letters of gold over every tribunal in this country.

One other suggestion in respect to these opinions of Marshall. I have said they were models of reasoning and of judicial style; and I repeat the remark. If the Constitution were out of existence — if the whole subject which they discuss were to become only a thing of the past, of no further human significance, they would still retain their value, as among the most admirable productions in the logic and literature of jurisprudence. There are two kinds of reasoning prevalent at the bar, and prevalent I may say without undue disparagement, sometimes on the bench. There is the reasoning that silences, and the reasoning that convinces; and they are very different things. The casuistry and plausibility, the dexterity and subtlety, the circuitous and round-about processes of indirection which may confound an antagonist who is not strong enough in dialectics to refute them, is altogether a different thing from that simple, direct, straightforward, honest reasoning that silences as a demonstration in Euclid silences, because it convinces. Such was the reasoning of Marshall, born of intellectual as well as moral honesty, the tough and vigorous fibre of the man. And this it was in great measure that

carried home and established in the understanding and judgment of mankind the truths it embodied.

It is foreign to my purpose and beyond the limits I fear I am already transgressing, to follow the labors of the Chief Justice any further. I shall not at all advert to their value, their eminence, their greatness, in so many other branches of jurisprudence besides constitutional law. I shall not try to depict — no poor words of mine could depict — the spectacle which that unassuming but dignified tribunal presented during thirty-five years of time, while with unabated strength he continued to preside there until the snows of four-score winters had fallen on his head; surrounded by the associates and the circle of advocates I have before referred to — dealing with the greatest questions, the most important interests in the light of the highest reason, the finest learning, the most elevated sentiment, and often with an affecting eloquence which in our busy day has disappeared from courts of justice, to be heard there no more; enshrined in the respect, the affection, the veneration of all his countrymen; no breeze of party conflict but was hushed in his presence, no wave of sectional quarrel but broke and subsided when it reached his feet. His life, strange to say, remains to be written. Lives enough have been thought worth writing, that never were worth living, but the life of the great magistrate is unwritten still. Perhaps it is as well that it should be. Time was needed to set its seal upon the great lessons he taught; experience was requisite to show what was the result of following, and what the result of departing from them. Some day the history of that life — that grand, pure life — will be adequately written. But let no 'prentice hand essay the task! He should possess the grace of Raphael and the color of Titian who shall seek to transfer to an enduring canvas that most exquisite picture in all the receding light of the days of the early republic.

Perhaps the brethren of our profession do not always remember the high prerogative which under the system of fundamental law, different from any other we know of, the American Bar enjoys. Lawyers in other countries have nothing to do as lawyers with constitutional principles of government or with the basis on which its

administration stands. They deal exclusively with the administration of justice, civil and criminal, between man and man, under a government established and fixed, with the operations of which they have professionally no concern. We, on the other hand, are charged with the safekeeping of the Constitution itself. It is from your ranks that judicial vacancies are constantly to be filled up; the lawyers of to-day are the judges of to-morrow. It is by your discussions, in the light of your writings, by the aid of your labors that every successive question that arises touching the fundamental law is to be adjudicated. Great and distinguished as the English Bar is and has been, it never had any such function as this. And that is doubtless one reason why the great advocates of the period to which I have alluded were able to achieve such distinction. They were dealing with a class of subjects which lawyers had never dealt with before. "Your mere *nisi prius* lawyer," said Burke, when harassed with the technical objections of his adversaries on the impeachment of Hastings: "Your mere *nisi prius* lawyer knows no more of the principles that control the affairs of State than a titmouse knows of the gestation of an elephant." The remark was as true as it was pungent, when applied to the bar to which he referred. But it has no just application to ours. If the fundamental proposition I have stated is sound, if the Constitution that affords the basis of government as well as of forensic law belongs to the judicial department to determine and to administer, then it is placed in the safekeeping of the American Bar. And we enjoy, as I have said, such a prerogative as never before was conferred upon a body of advocates.

But does that high prerogative carry with it no corresponding duty? Are we charged with nothing as the price of such a privilege? Have we no other trust to execute in respect to the American Constitution than that which all citizens are charged with, and are expected to perform? It is idle to adjure men to maintain the Constitution, or to compel them to swear to support it. Every man proposes to maintain and support the Constitution — as his party understands it. The question is, what is the Constitution? When a great and



critical emergency arises, when a crisis fraught with extreme and vital consequences approaches, what is the Constitution? Who is to determine it, and above all, upon what principle and basis of construction? That is the question.

It was pointed out to us in the elegant and scholarly essay of Mr. Mercer, to which we listened last night, how the concurrent testimony of all human experience establishes the truth, that the interpretation and the strength of law is but a reflex of the national spirit out of which all law arises. There is, as it seems to me, a practical and immediate application of that proposition to the legal profession of this country, in this very particular. Their influence is great; their influence upon legislation — their influence upon judicial proceedings — their influence upon the public mind — upon political sentiment, especially in respect to questions particularly within their province. It is from them that the true spirit of the jurisprudence of the country on all subjects, and above all this subject, must of necessity emanate. It is they who make it; it is through them that it must take effect. That political parties will always exist is inevitable; that they always should exist is probably desirable; that members of our profession, as of all other professions, should represent all shades of political opinion, and belong to all parties, is to be expected; though I hope on some of them party ties hang very loose. The question is how far party differences shall go. Where shall they set out, where shall they terminate? Shall they invade the province of the fundamental law? Is that to be administered by politicians, to be construed by caucuses, to stand or fall upon political considerations, and for the purposes of partisan success? Are not there divergent paths enough, which starting from the Constitution as a common ground, and running in every direction through all the ramifications of the administration of government, through the whole boundless field of policy, and statesmanship, and expediency, are not they enough for all the purposes of politics, and all the warfare of party? Should not the lawyers of this country meet as on a common ground, in respect to all questions arising upon the National Constitution,



dealing with them as questions of jurisprudence and not of party, setting their feet upon and their hands against all efforts to transgress the true limits of the Constitution, or to make it at all the subject of political discussion? It is too true that this Constitution of ours, in respect of which it might well be said to him who approaches it, "put off thy party shoes from off thy feet, for the place on which thou standest is holy ground," it is too true, that it has become more and more a subject to be hawked about the country, debated in the newspapers, discussed from the stump, elucidated by pot-house politicians and dung-hill editors, scholars in the science of government who have never found leisure for the graces of English grammar or the embellishments of correct spelling.

When we reflect upon all this country has passed through, is there no light to be gathered from experience? Should not the members of this conservative profession, "as honorable as justice, as ancient as the forms of law," charged with a duty in this regard so special and so important, should not they stand together upon these as upon all other questions of jurisprudence, considering and discussing them only upon considerations that belong to jurisprudence, and not upon those that are in the domain of politics? Should not they of all men stand together and unite to put an end, as I believe they might put an end if their action was unanimous, not to political controversy — that is neither to be expected nor desired — but to that most destructive form of political controversy, coming from whatever party, or from whatever quarter, or for whatever purpose, that seeks to invade the foundations of the constitutional law, and to plant them on the shifting and treacherous sands of partisan expediency?

And, gentlemen, allow me one further suggestion. What good is to come from this Association we are trying to build up? What is to be its significance, or its ultimate value? What is to repay us, or any of us, for turning aside from the current of our busy lives to meet together here? Questions of detail in the machinery of the law will be usefully dealt with, no doubt. The pleasure of meeting and forming acquaintances between men

of the profession from all the various States will doubtless be great. But what final good, what permanent usefulness, is reasonably to be expected from it, unless it be the creation in our profession, by common consent, by mutual intercourse and support, of a broad, national, elevated, independent, fearless spirit of constitutional jurisprudence? The spirit that builds up and perpetuates, rather than that which pulls down and destroys.

We come together from all parts of our country — our common country — from the scenes of a desolation and sorrow on all hands, that God alone can estimate — over graves numberless to our arithmetic — the harvest of the effort to settle constitutional questions by force of arms. Let it all pass. We come to bury the armed Cæsar, not to praise him. To renew again in faith and hope the work which Marshall and his associates began, of cementing and building up on firm and lasting foundations, the American Constitution. Is it the court alone that is charged with that duty? Have we no part or lot in the matter? Lingers among us no memory of those who are gone? Comes down to us no echo from our father's time that shall awake an answering voice?

Fortunately for us all we have in the successors of the old court an upright and excellent tribunal. Judges who have addressed themselves and will continue to address themselves with great ability, patriotism and success to the difficult and embarrassing questions born of the troubled time. But no court can stand without the cordial support of the bar. It was the strength of Marshall's court that those great men who rallied about it in the profession and aided in its discussions stood by it and sustained it before the country when important decisions were made, with a moral force that was adequate to all occasions.

It is idle to say that our sky is free from clouds. It is useless to deny that wise and thoughtful men entertain grave doubts about the future. The period of experiment has not yet passed, or rather has been again renewed. The stability of our system of government is not yet assured. The demagogue and the caucus still threaten the Nation's life. But we shall not despair. Still remains to us "our faith, triumphant o'er our fears."

Let us only for our part see to it that we discharge the duty that every man owes to his profession. And come what may,

“Thro’ plots and counter plots —  
Thro’ gain and loss — thro’ glory and disgrace —  
Along the plains where passionate discord rears  
Eternal Babel,”

let us join hands in a fraternal and unbroken clasp, to maintain the grand and noble traditions of our inheritance, and to stand fast by the ark of our covenant.

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## IV.

### Address of Chief Justice Waite,

At the unveiling of the statue of Chief Justice John Marshall in front of the Capitol,  
Washington, May 10, 1884.<sup>1</sup>

Chief Justice Marshall died in Philadelphia on the 6th of July, 1835. The next day the bar of that city met and resolved "that it be recommended to the bar of the United States to co-operate in erecting a monument to his memory at some suitable place in the city of Washington." The committee charged with the duty of carrying this recommendation into effect were Mr. Duponceau, Mr. Binney, Mr. Sergeant, Mr. Chauncey, and Mr. J. R. Ingersoll. A few days later the bar of the city of New York appointed Mr. S. P. Staples, Mr. R. M. Blatch-

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<sup>1</sup> Delivered in the presence of both Houses of Congress, the President, the chief officers of the Government, and a large concourse of citizens at the unveiling of the bronze statue of Chief Justice Marshall at Washington, May 10, 1884, erected pursuant to the act of Congress, approved March 10, 1882. See 112 United States, 745 *et seq.* The following is the Act of Congress above mentioned:

AN ACT to authorize the erection of a statue of Chief Justice Marshall.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the Senate and the Speaker of the House of Representatives do appoint a joint committee of three Senators and three Representatives with authority to contract for and erect a statue to the memory of Chief Justice John Marshall, formerly of the Supreme Court of the United States; that said statue shall be placed in a suitable public reservation, to be designated by said joint committee, in the city of Washington; and for said purpose the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the treasury not otherwise appropriated.

This address of Chief Justice Waite and the oration of William Henry Rawle, Esq., which follows, were published by the Government in a volume the title-page whereof is as follows: "Exercises at the Ceremony of Unveiling the Statue of John Marshall, Chief Justice of the United States, in front of the Capitol, Washington, May 10, 1884. With the Address of Mr. Chief Justice Waite, and the Oration of William Henry Rawle, Esq., LL. D. With the proceed-

ford, Mr. Beverley Robinson, Mr. Hugh Maxwell and Mr. George Griffin to represent them in the work which had thus been inaugurated. Undoubtedly there were similar organizations in other localities, but the publications of the day, to which access has been had, contain no notice of them. The Philadelphia committee, "desiring to make the subscriptions as extensive as possible, and to avoid inconvenience to those who may be willing to unite with them," expressed the wish "that individual subscriptions should be moderate, and that the required amount may be made up by the number of contributions, rather than the magnitude of particular donations, so that the monument may truly be the work of the bar of the United States, and an enduring evidence of their veneration for the memory of the illustrious deceased." Accordingly, in Philadelphia no more than \$10 was received from any one member, and the committees of other localities were advised of the adoption of this regulation. In this way the sum of \$3,000 was collected,

ings of the Philadelphia Bar relating to the Monument to Chief Justice Marshall. Washington: Government Printing Office. 1884." The Government publication contains, as a frontispiece, a steel engraving of the statue made by the Bureau of Engraving and Printing, which is reproduced as one of the illustrations of the present volume. The proceedings of the Philadelphia Bar at meetings above mentioned, held in 1835 and 1882, relate to the fund raised by the Philadelphia Bar to aid in the erection of the statue of Chief Justice Marshall, and are referred to in the address of Chief Justice Waite, as well as in the oration of Mr. Rawle.

In the *Laws and Jurisprudence of England and America*, this statue is thus referred to (p. 166): "For nearly fifty years after his death the nation failed to show in any overt manner an adequate appreciation of the simplicity, worth and dignity of Marshall's character, and of his unequalled judicial fitness and qualities; at all events, it failed to display any public memorial of gratitude for those labors which not only so greatly contributed to make the Supreme Bench illustrious, but which enabled the country to attain unto its present stature without any strain upon the Constitution. The bar and the nation have, though tardily, shown themselves worthy of the inheritance of such a name and of such labors, by erecting a statue to his memory, executed by the gifted son of his loved and eminent associate, to the end that the chief executive, the legislator, the suitor, the lawyer, the judge, and the citizen, may in all coming time, as they go to or return from the Capitol, be reminded of the thoughtful though severely plain features, the calm majesty, the placid courage, the lofty character, the inestimable public services of him whose uncontested and unenvied title is that of the Great Chief Justice."



and then the subscriptions stopped. Not so, however, the work of the Philadelphia committee — or, as I prefer to call them, the Philadelphia trustees,— for a few years ago the last survivor of them brought out their package of securities, and it was shown that under their careful and judicious management the \$3,000 of 1835 had grown in 1880 to be almost \$20,000.

At this time it was thought something might be done by the bar alone to carry out, in an appropriate way, the original design; but Congress, in order that the nation might join the bar in honoring the memory of the great man to whom so much was due, added another \$20,000 to the lawyers' fund, and to-day Congress as well as the bar has asked you here to witness the unveiling of a monument which has been erected under these circumstances.

For twenty-four years there sat with the Chief Justice on the bench of the Supreme Court one whose name is largely associated with his own in the judicial history of the times. I need hardly say I refer to Mr. Justice Story. Fortunately a son of his, once a lawyer himself, had won distinction in the world of art, and so it was specially fit that he should be employed, as he was, to develop in bronze the form of one he had from his earliest childhood been taught to love and to revere. How faithfully and how appropriately he has performed his task you will soon be permitted to see.

But, before this is done, let me say a few words of him we now commemorate. Mr. Justice Story, in an address delivered on the occasion of his death, speaks "of those exquisite judgments, the fruits of his own unassisted meditations, from which the court has received so much honor," and I have sometimes thought even the bar of the country hardly realizes to what extent he was, in some respects, unassisted. He was appointed Chief Justice in January, 1801, and took his seat on the bench at the following February term. The court had then been in existence but eleven years, and in that time less than one hundred cases had passed under its judgment. The engrossed minutes of its doings cover only a little more than two hundred pages of one of the volumes of its records, and its reported decisions fill but five hundred

pages of three volumes of the reports published by Mr. Dallas. The courts of the several colonies before the Revolution, and of the States afterwards, had done all that was required of them, and yet the volumes of their decisions published before 1801 can be counted on little more than the fingers of a single hand, and if these and all the cases decided before that time, which have been reported since, were put into volumes of the size now issued by the reporter of the Supreme Court, it would not require the fingers of both the hands for their full enumeration. The reported decisions of all the Circuit and District Courts of the United States were put into a little more than two hundred pages of Dallas.

In this condition of the jurisprudence of the country Marshall took his place at the head of the national judiciary. The Government, under the Constitution, was only organized twelve years before, and in the interval eleven amendments of the Constitution had been regularly proposed and adopted. Comparatively nothing had been done judicially to define the powers or develop the resources of the Constitution. The common law of the mother country had been either silently or by express enactment adopted as the foundation of the system by which the rights of persons and property were to be determined, but scarcely anything had been done by the courts to adapt it to the new form of government, or to the new relations of social life which a successful revolution had produced. In short, the Nation, the Constitution, and the Laws were in their infancy. Under these circumstances it was most fortunate for the country that the great Chief Justice retained his high position for thirty-four years, and that during all that time, with scarcely any interruption, he kept on with the work he showed himself so competent to perform. As year after year went by and new occasion required, with his irresistible logic, enforced by his cogent English, he developed the hidden treasures of the Constitution, demonstrated its capacities, and showed beyond all possibility of doubt that a government rightfully administered under its authority could protect itself against itself and against the world. He kept himself at the front on all questions of constitutional law, and, consequently, his

master hand is seen in every case which involved that subject. At the same time he and his co-workers, whose names are, some of them, almost as familiar as his own, were engaged in laying, deep and strong, the foundations on which the jurisprudence of the country has since been built. Hardly a day now passes in the court he so dignified and adorned without reference to some decision of his time as establishing a principle which, from that day to this, has been accepted as undoubted law.

It is not strange that this is so. Great as he was, he was made greater by those about him, and the events in the midst of which he lived. He sat with Paterson, with Bushrod Washington, with William Johnson, with Livingston, with Story, and with Thompson, and there came before him Webster and Pinkney and Wirt and Dexter and Sergeant and Binney and Martin, and many others equally illustrious, who then made up the bar of the Supreme Court. He was a giant among giants. Abundance of time was taken for consideration. Judgments, when announced, were the result of deliberate thought and patient investigation, and opinions were never filed until they had been prepared with the greatest care. The first volume of Cranch's Reports embraces the work of two full years, and all the opinions save one are from the pen of the Chief Justice. Twenty-five cases only are reported, but among them is *Marbury v. Madison*, in which, for the first time, it was announced by the Supreme Court that it was the duty of the judiciary to declare an act of the legislative department of the government invalid if clearly repugnant to the Constitution.

After this came, in quick succession, all the various questions of constitutional, international and general law which would naturally present themselves for judicial determination in a new and rapidly developing country. The complications growing out of the wars in Europe, and of our own war with Great Britain, brought up their disputes for settlement, and the boundary line between the powers of the States and of the United States had more than once to be run and marked. The authority of the United States was extended by treaty over territory not originally within its jurisdiction. All these involved the consideration of subjects comparatively new in the

domain of the law, and rights were to be settled, not on authorities alone, but by the application of the principles of right reason. Here the Chief Justice was at home, and when, at the end of his long and eminent career, he laid down his life, he, and those who had so ably assisted him in his great work, had the right to say that the judicial power of the United States had been carefully preserved and wisely administered. The nation can never honor him, or them, too much for the work they accomplished.

Without detaining you longer, I ask you to look upon what is hereafter to represent, at the seat of government, the reverence of the Congress and the bar of the United States for John Marshall, "The Expounder of the Constitution."

## V.

### Oration by William Henry Rawle, Esq., of the Philadelphia Bar.<sup>1</sup>

John Marshall, Chief Justice of the United States, has been dead for nearly half a century, and if it be asked why at this late day we have come together to do tardy justice to his memory and unveil this statue in his honor, the answer may be given in a few words. The history dates from his death. He had held his last court, and had come northward to seek medical aid in the city of Philadelphia, and there, on the 6th of July, 1835, he died. While tributes of respect for the man and of grief for the national loss were paid throughout the country, it was felt by the bar of the city where he died that a lasting monument should be erected to his memory in the capital of the nation. To this end subscriptions, limited in amount, were asked. About half came from the bar of Philadelphia, and of the rest, the largest contribution was from the city of Richmond, but all told, the sum was utterly insufficient. What money there was, was invested by trustees as "The Marshall Memorial Fund," and then the matter seemed to pass out of men's minds. Nearly fifty years went on. Another generation and still another came into the world, till lately, on the death of the survivor of the trustees, himself an old man, the late Peter McCall, the almost forgotten fund was found to have been increased, by honest stewardship, sevenfold. Of the original subscribers but six were known to be alive, and upon their application trustees were appointed to apply the fund to its original purpose. It happened that at this time the Forty-seventh Congress

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<sup>1</sup> Delivered at the conclusion of the foregoing address of Chief Justice Waite at the unveiling of the statue of Chief Justice Marshall at Washington, May 10, 1884, erected pursuant to the Act of Congress, approved March 10, 1882. (112 United States, 745 *et seq.*, where the address of the Chief Justice and the oration of Mr. Rawle are given.)



appropriated of the people's money a sum about equal in amount for the erection of a statue to the memory of Chief Justice Marshall, to be "placed in a suitable public reservation in the city of Washington." To serve their common purpose, the Congressional committee and the trustees agreed to unite in the erection of a statue and pedestal; and after much thought and care the commission was intrusted to William W. Story, an artist who brought to the task not only his acknowledged genius, but a keen desire to perpetuate through the work of his hands the face and form of one who had been not only his father's professional brother, but the object of his chiefest respect and admiration. That work now stands before you. Its pedestal bears the simple inscription: —

JOHN MARSHALL  
CHIEF JUSTICE OF THE UNITED STATES  
ERECTED BY  
THE BAR AND THE CONGRESS  
OF THE UNITED STATES  
A. D. MDCCCLXXXIV.

No more "suitable public reservation" could be found than the ground on which we stand, almost within the shadow of the Capitol in which for more than thirty years he held the highest judicial position in the country.

It may well be that the even tenor of his judicial life has driven from some minds the story of his brilliant and eventful youth. The same simplicity, the same modesty which marked the child distinguished the great Chief Justice, but, as a judge, his life was necessarily one of thought and study, of enforced retirement from much of the busy world, dealing more with results than processes; and the surges of faction and of passion, the heat of ambition, the thirst of power, reached him not in his high judicial station. Yet he had himself been a busy actor on the scenes of life, and if his later days seemed colorless, the story of his earlier years is full of charm.

The eldest of a large family, reared in Fauquier county, in Virginia, he was one of the tenderest, the most lovable of children. He had never, said his father, seriously displeased him in his life. To his mother, to his sisters especially, did he bear that chivalrous devotion which to

the last hour of his life he showed to women. Such education as came to him was little got from schools, for the thinly-settled country and his father's limited means forbade this. A year's Latin at fourteen at a school a hundred miles from his home, and another year's Latin at home with the rector of the parish was the sum of his classical teaching. What else of it he learned was with the unsympathetic aid of grammar and dictionary. But his father — who, Marshall was wont to say, was a far abler man than any of his sons, and who in early life was Washington's companion as a land surveyor, and later fought gallantly under him — his father was well read in English literature, and loved to open its treasures to the quick, receptive mind of his eldest child, who in it all, especially in history and still more in poetry, found an enduring delight. Much of his time was passed in the open air, among the hills and valleys of that beautiful country, and thus it was that in active exercise, in day dreams of heroism and poetry, in rapid and eager mastery of such learning as came within his reach, and surrounded by the tender love, the idolatry of a happy family, his earlier days were passed.

The first note of war that rang through the land called him to arms, and from 1775, when was his first battle on the soil of his own State, until the end of 1779, he was in the army. Through the battles of Iron Hill, of Brandywine, of Germantown and of Monmouth, he bore himself bravely, and through the dreary privations, the hunger and the nakedness of that ghastly winter at Valley Forge, his patient endurance and his cheeriness bespoke the very sweetest temper that ever man was blessed with. So long as any lived to speak, men would tell how he was loved by the soldiers and by his brother officers; how he was the arbiter of their differences and the composer of their disputes, and when called to act, as he often was, as judge advocate, he exercised that peculiar and delicate judgment required of him who is not only the prosecutor but the protector of the accused. It was in the duties of this office that he first met and came to know well the two men whom of all others on earth he most admired and loved, and whose impress he bore through his life,— Washington and Hamilton.

While of Marshall's life war was but the brief opening episode, yet before we leave these days, one part of them has a peculiar charm. There were more officers than were needed, and he had come back to his home. His letters from camp had been read with delight by his sisters and his sisters' friends. His reputation as a soldier had preceded him, and the daughters of Virginia, then, as ever, ready to welcome those who do service to the State, greeted him with their sweetest smiles. One of these was a shy, diffident girl of fourteen; and to the amazement of all, and perhaps to her own, from that time his devotion to her knew no variableness neither shadow of turning. She afterwards became his wife, and for fifty years, in sickness and in health, he loved and cherished her, till, as he himself said, "her sainted spirit fled from the sufferings of life." When her release came at last, he mourned her as he had loved her, and the years were few before he followed her to the grave.

But from this happy home he tore himself away, and at the College of William and Mary attended a course of law lectures and in due time was admitted to practice. But practice there was none, for Arnold had then invaded Virginia, and it was literally true that *inter arma silent leges*. To resist the invasion, Marshall returned to the army, and at its end, there being still a redundancy of officers in the Virginia line, he resigned his commission and again took up his studies. With the return of peace the courts were opened and his career at the bar began. Tradition tells how even at that early day his characteristic traits began to show themselves — his simple, quiet bearing, his frankness and candor, his marvelous grasp of principle, his power of clear statement and his logical reasoning. It is pleasant to know that his rapid rise excited no envy among his associates, for his other high qualities were exceeded by his modesty. In after life this modesty was wont to attribute his success to the "too partial regard of his former companions-in-arms, who, at the end of the war, had returned to their families and were scattered over the States." But the cause was in himself, and not in his friends.

In the spring of 1782 he was elected to the State Legis-

lature, and in the autumn chosen to the Executive Council. In the next year took place his happy marriage, his removal to Richmond, thenceforth his home, and, soon after, his retirement, as he supposed, from public life. But this was not to be, for his election again and again to the Legislature called on him for service which he was too patriotic to withhold, even had he felt less keenly how full of trouble were the times. Marshall threw himself, heart and soul, into the great questions which bade fair to destroy by dissension what had been won by arms, and, opposed to the best talent of his own State, he ranged himself with an unpopular minority. In measured words, years later, when he wrote the life of Washington, he defined the issue which then threatened to tear the country asunder. It was, he said, "divided into two great political parties, the one of which contemplated America as a Nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State Government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members." Though the proposed Constitution might form, as its preamble declares, "a more perfect union" than had the Articles of Confederation; though it might prevent anarchy and save the States from becoming secret or open enemies of each other; though it might replace "a government depending upon thirteen distinct sovereignties for the preservation of the public faith" by one whose power might regulate and control them all,—the more numerous and powerful, and certainly the more clamorous, party insisted that such evils, and evils worse than these, were as nothing compared to the surrender of State independence to Federal sovereignty. In public and private, in popular meetings, in legislatures and in conventions, on both sides passion was mingled with argument. Notably in Marshall's own State did many of her ablest sons, then and afterwards most dear to her, throw all that they had of courage, of high character and of patriotism into the attempt to save the young country from its threatened yoke of despotism. Equally brave and able were



those few who led the other party, and chief among them were Washington, Madison, Randolph and, later, Marshall. Young as he was, it was felt that such a man could not be left out of the State convention to which the Constitution was to be submitted, but he was warned by his best friends that unless he should pledge himself to oppose it his defeat was certain. He said plainly that, if elected, he should be "a determined advocate for its adoption," and his integrity and fearlessness overcame even the prejudices of his constituents. And in that memorable debate, which lasted five-and-twenty days, though with his usual modesty he contented himself with supporting the lead of Madison, three times he came to the front, and to the questions of the power of taxation, the power over the militia and the power of the judiciary, he brought the full force of his fast developing strength. The contest was severe and the vote close. The Constitution was ratified by a majority of only ten. But as to Marshall, it has been truly said that "in sustaining the Constitution he unconsciously prepared for his own glory the imperishable connection which his name now has with its principles." And again his modesty would have it that he builded better than he knew, for in later times he would ascribe the course which he took to casual circumstances as much as to judgment; he had early, he said, caught up the words, "United we stand, divided we fall;" the feelings they inspired became a part of his being; he carried them into the army, where, associating with brave men from different States who were risking life and all else in a common cause, he was confirmed in the habit of considering America as his country, and Congress as his government.

The convention was held in 1788. Again Marshall was sent to the Legislature, where in power of logical debate he confessedly led the House, until in 1792 he left it finally.

During the next five years he was at the height of his professional reputation. The Federal reports and those of his own State show that among a bar distinguished almost beyond all others, he was engaged in most of the important cases of the time. A few of these he has reported himself; they are modestly inserted at the end



of the volume, and are referred to by the reporter as contributed "by a gentleman high in practice at the time, and by whose permission they are now published."

And here a word must be said as to the nature and extent of his technical learning, for it is almost without parallel that one should admittedly have held the highest position at the bar, and then for thirty-five years should, as admittedly, have held the reputation of a great judge, when the entire time between the very commencement of his studies and his relinquishment of practice was less than seventeen years. In that generation of lawyers and the generation which succeeded them, it was not unusual that more than half that time passed before they had either a cause or a client. Marshall had emphatically what is called a legal mind; his marvelous instinct as to what the law *ought* to be doubtless saved him much labor which was necessary to those less intellectually great. With the principles of the science he was of course familiar; with their sources he was scarcely less so. A century ago there was less law to be learned and men learned it more completely. Except as to such addition as has of late years come to us from the civil law, the foundation of it was the same as now — the same common law, the same decisions, the same statutes,— and in that day a century's separation from the mother country had wrought little change in the colonies except to adapt this law to their local needs with marvelous skill. Save as to this, the law of the one country was the law of the other, and the decisions at Westminster Hall before the Revolution were of as much authority here as there. There was not a single published volume of American Reports. The enormous superstructure which has since been raised upon the same foundation, bewildering from its height, the number of its stories, the vast number of its chambers, the intricacies of its passages, has been a necessity from the growth of a country rapid beyond precedent in a century to which history knows no parallel. But the foundation of it was the same, and the men of the last century had not far to go beyond the foundation, and hence their technical learning was, as to some at least, more complete, if not more profound. There were a few who said that

Marshall was never what is called a thoroughly technical lawyer. If by this is meant that he never mistook the grooves and ruts of the law for the law itself — that he looked at the law from above and not from below, and did not cite precedent where citation was not necessary,—the remark might have semblance of truth, but the same might be said of his noted abstinence from illustration and analogy, both of which he could, upon occasion, call in aid; but no one can read those arguments at the bar or judgments on the bench in which he thought it needful to establish his propositions by technical precedents, without feeling that he possessed as well the knowledge of their existence and the reason of their existence as the power to analyze them. But he never mistook the means for the end.

Even in the height of his prosperous labor he never turned his back upon public duty. Not all the excesses of the French Revolution could make the mass of Americans forget that France had been our ally in the war with England, and when, in 1793, these nations took arms against each other, and our proclamation of neutrality was issued to the world, loud and deep were the curses that rang through the land. Hated as the proclamation was, Marshall had no doubt of its wisdom. Great was his grief to oppose himself to the judgment of Madison, but he was content to share the odium heaped upon Hamilton and Washington, and to be denounced as an aristocrat, a loyalist and an enemy to republicanism. With rare courage, at a public meeting at Richmond he defended the wisdom and policy of the administration, and his argument as to the constitutionality of the proclamation anticipated the judgment of the world.

Two years later came a severer trial. Without his knowledge and against his will, Marshall had been again elected to the Legislature. Our minister to Great Britain had concluded a commercial treaty with that power, and its ratification had been advised by the Senate and acted on by the President. The indignation of the people knew no bounds. In no State was it greater than in Virginia. The treaty was “insulting to the dignity, injurious to the interests, dangerous to the security, and

repugnant to the Constitution of the United States" — so said the resolutions of a remarkable meeting at Richmond, and these words echoed through the country. Had not the Constitution given to Congress the right to regulate commerce, and how dared the Executive, without Congress, negotiate a treaty of commerce? Marshall's friends begged him, for his own sake, not to stem the popular torrent. He hoped at first that his own Legislature might, as he wrote to Hamilton from Richmond, "ultimately consult the interest or honor of the nation. But now," he went on to say, "when all hope of this had vanished, it was deemed advisable to make the experiment, however hazardous it might be. A meeting was called which was more numerous than I have ever seen at this place; and after a very ardent and zealous discussion, which consumed the day, a decided majority declared in favor of a resolution that the welfare and honor of the nation required us to give full effect to the treaty negotiated with Britain." Thus measuredly he told the story of one of his greatest triumphs, and afterwards, in his place in the House, he again met the constitutional objection in a speech which, men said at the time, was even stronger than the other. As he spoke, reason asserted her sway over passion, party feeling gave way to conviction, and for once the vote of the House was turned. Of this speech no recorded trace remains, but even in that time, when news traveled slowly, its fame spread abroad, and the subsequent conduct of every administration has to this day rested upon the construction then given to the Constitution by Marshall.

Henceforth his reputation became national, and when, a few months later, he came to Philadelphia to argue the great case of the confiscation by Virginia of the British debts, a contemporary said of him, "Speaking, as he always does, to the judgment merely, and for the simple purpose of convincing, he was justly pronounced one of the greatest men in the country." He were less than human not to be moved by this, but, in writing to a friend he modestly said, "A Virginian who supported with any sort of reputation the measures of the Government was such a *rara avis* that I was received with a degree of

kindness which I had not anticipated." Soon after, Washington offered him the position of Attorney-General, and some months later, the mission to France. Both he declined. His determination to remain at the Bar was, he thought, unalterable.

And again he altered it. Our relations with France had drifted from friendship to coolness, and from coolness to almost war. Neither France herself nor the "French patriots" here had forgotten or forgiven the treaty with Great Britain, and if the disgust at our persistent neutrality did not break into open war, it was because France knew, or thought she knew, that the entire American opposition to the Government was on her side. Just short of war she stopped. Privateers fitted out by orders of the French minister here preyed upon our commerce; the very ship which brought him to our shores began to capture our vessels before even his credentials had been presented; later, by order of the Directory, he suspended his diplomatic functions here and flung to our people turgid words of bitterness as he left; the minister whom we had sent to France when Marshall had declined to go, was not only not received, but was ordered out of the country and threatened with the police. The crisis required the greatest wisdom and firmness which the country could command. Mr. Adams was then President; he never lacked firmness, and his words to Congress at its special session were full of fearless dignity. "Three envoys," said he, "persons of talents and integrity, long known and intrusted in the three great divisions of the Union," were to be sent to France, and Marshall was to be one of them. It went hard with him, but the struggle was short, and as he left his home at Richmond crowds of citizens attended him for miles, and all party feeling was merged in respect and affection. The issue of his errand belongs to history. He has himself told us, in his *Life of Washington*, how the envoys — his own name being characteristically withheld — were met by contumely and insult; how the wildest minister of the age suggested that a large sum of money must be paid to the Directory as a mere preliminary to negotiation; how, if they refused, it would be known at home that they were corrupted by British influence, and how



insults and menaces were borne with equal dignity. But he has not told us that his were the two letters to Talleyrand which have justly been regarded as among the ablest state papers in diplomacy. They were unanswerable, and nothing remained but to get Marshall and one of his colleagues out of the country with as little delay as was consistent with additional marks of contempt. His return showed that republics are not always ungrateful, for there came out to him on his arrival a crowd even greater than that which had witnessed his departure, the Secretary of State and other officials among them, and at a celebration in his honor the phrase was coined which afterwards became national, "Millions for defense, but not one cent for tribute."

Now, surely, he had earned the right to return to his loved professional labor. Nor only this — he had earned the right to such honor as the dignified labor of high judicial station could alone afford. The position of Justice of the Supreme Court of the United States had fallen vacant, and the President's choice rested on Marshall. "He has raised the American people in their own esteem," wrote Mr. Adams to the Secretary of State, "and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter." But again there had come to him the call of duty; for Washington, who, in view of the expected war with France, had been appointed to command the army, had begged Marshall to come to him at Mount Vernon, and there in earnest talk for days dwelt upon the importance to the country that he should be returned to Congress. His reluctance was great not only to re-enter public life, but to throw himself into a contest sure to be marked with an intensity of public excitement, degenerating into private calumny. If Washington himself had not escaped this, how should he?

The canvass began. In the midst of it came the offer of the repose and dignity of the Supreme Bench. But his word had been given and he at once declined. The contest was severe, his majority was small, and his election, though intensely grateful to Washington and those who thought with him, was met with many misgivings from some who thought him "too much disposed to govern the world according to rules of logic."



His first act in Congress was to announce the death of Washington, and the words of the resolutions which he then presented, though written by another, meet our eyes on every hand, "First in war, first in peace, and first in the hearts of his countrymen." It was like Marshall that when later he came to write the life of Washington, he should have said that the resolutions were presented by "a member of the House."

In that House — the last Congress that sat in Philadelphia — he met the ablest men of the country. New member as he was, when the debate involved questions of law or the Constitution he was confessedly the first man in it. His speech on the question of Nash's surrender is said to be the only one ever revised by him, and, as it stands, is a model of parliamentary argument. The President had advised the surrender of the prisoner to the English Government to answer a charge of murder on the high seas on board a British man-of-war. Popular outcry insisted that the prisoner was an American, unlawfully impressed, and that the death was caused in his attempt to regain his freedom; and though this was untrue, it was urged that as the case involved principles of law, the question of surrender was one for judicial and not executive decision. In most of its aspects the subject was confessedly new, but it was exhausted by Marshall. Not every case, he showed, which involves principles of law necessarily came before the courts; the parties here were two nations, who could not litigate their claims; the demand was not a case for judicial cognizance; the treaty under which the surrender was made was a law enjoining the performance of a particular object; the department to perform it was the Executive, who, under the Constitution, was to "take care that the laws be faithfully executed;" and even if Congress had not yet prescribed the particular mode by which this was to be done, it was not the less the duty of the Executive to execute it by any means it then possessed.

There was no answer to this worthy the name; the member selected to answer it sat silent; the resolutions against the erection were lost, and thus the power was lodged where it should belong, and an unwelcome and inappropriate jurisdiction diverted from the judiciary.

The session was just over when, in May, the President, without consulting Marshall, appointed him Secretary of War. He wrote to decline. As part of the well-known disruption of the Cabinet the office of Secretary of State became vacant and Marshall was appointed to and accepted it. During his short tenure of office an occasion arose for the display of his best powers, in his dispatch to our minister to England concerning questions of great moment under our treaty, of contraband, blockade, impressment and compensation to British subjects, a State paper not surpassed by any in the archives of that department.

The autumn of 1800 witnessed the defeat of Mr. Adams for the Presidency and the resignation of Chief Justice Ellsworth, and, at Marshall's suggestion, Chief Justice Jay was invited to return to his former position, but declined. On being again consulted, Marshall urged the appointment of Mr. Justice Paterson, then on the Supreme Bench. Some said that the vacant office might possibly be filled by the President himself after the 3d of March, but Mr. Adams disclaimed the idea. "I have already," wrote he, "by the nomination to this office of a gentleman in full vigor of middle life, in the full habits of business, and whose reading in the science of law is fresh in his head, put it wholly out of my power, and indeed it never was in my hopes and wishes;" and on the 31st of January, 1801, the President requested the Secretary of War "to execute the office of Secretary of State so far as to affix the seal of the United States to the inclosed commission to the present Secretary of State, John Marshall of Virginia, to be Chief Justice of the United States." He was then forty-six years old.

It is difficult for the present generation to appreciate the contrast between the Supreme Court to which Marshall came and the Supreme Court as he left it; the contrast is scarcely less between the court as he left it and the court of to-day. For the first time in the history of the world had a written Constitution become an organic law of government; for the first time was such an instrument to be submitted to judgment. With admirable force Mr. Gladstone has said: "As the British Constitution is the most subtile organism which has proceeded from pro-

gressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." On that subtle and unwritten Constitution of England the professional training of every older lawyer in the country had been based, and they had learned from it that the power of Parliament was above and beyond the judgments of any court in the realm. Though this American Constitution declared in so many words that the judicial power should extend to "all cases arising under the Constitution and the laws of the United States," yet it was difficult for men so trained to conceive how any law which the legislative department might pass and the Executive approve could be set aside by the mere judgment of a court. There was no precedent for it in ancient or modern history. Hence when first this question was suggested in a Federal court it was received with grave misgiving; the general principles of the Constitution were not, it was said, to be regarded as rules to fetter and control, but as matter merely declaratory and directory; and even if legislative acts directly contrary to it *should* be void, whose was the power to declare them so?

Equally without precedent was every other question. Those who, in their places as legislators, had fought the battle of State sovereignty, were ready to urge in the courts of justice that the Federal Government could claim no powers that had not been delegated to it *in ipsissimis verbis*. If delegated at all they were to be contracted by construction within the narrowest limits. Whether the right of Congress to pass all laws "necessary and proper" for the Federal Government was not restricted to such as were indispensable to that end; whether the right of taxation could be exercised by a State against creations of the Federal Government; whether a Federal court could revise the judgment of a State court in a case arising under the Constitution and laws of the United States; whether the officers of the Federal Government could be protected against State interference; how far extended the power of Congress to regulate commerce within the States; how far to regulate foreign commerce as against State enactment; how far extended the prohibition to the States against emit-

ting bills of credit — these and like questions were absolutely without precedent.

It is not too much to say that but for Marshall such questions could hardly have been solved as they were. There have been great judges before and since, but none had ever such opportunity, and none ever seized and improved it as he did. For, as was said by our late President, "He found the Constitution paper, and he made it power; he found it a skeleton and clothed it with flesh and blood." Not in a few feeble words at such a time as this can be told how, with easy power, he grasped the momentous questions as they arose; how his great statesmanship lifted them to a high plane; how his own clear vision pierced clouds which caused others to see as through a glass darkly, and how all that his wisdom could conceive and his reason could prove was backed by a judicial courage unequalled in history.

It may be doubted whether, great as is his reputation, full justice has yet been done him. In his interpretation of the law the premises seem so undeniable, the reasoning so logical, the conclusions so irresistible, that men are wont to wonder that there had ever been any question at all.

A single instance — the first which arose — may tell its own story. Congress had given to his own court a jurisdiction not within the range of its powers under the Constitution. If it could lawfully do this the case before the court was plain. Whether it could, said the court, in Marshall's words, "Whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest;" and in these few words was the demonstration made: "It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature can alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative



act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable."

Here was established one of the great foundation principles of the government, and then in a few sentences, and for the first time, was clearly and tersely stated the theory of the Constitution as to the separate powers of the legislature and the judiciary. If, he said, its theory was that an act of the legislature repugnant to it was void, such an act could not bind the courts and oblige them to give it effect. This would be to overthrow in fact what was established in theory. It was of the very essence of judicial duty to expound and interpret the law; to determine which of two conflicting laws should prevail. When a law came in conflict with the Constitution the judicial department must decide between them. Otherwise the courts must close their eyes on the Constitution, which they were sworn to support, and see only the law.

The exposition thus begun was continued for more than thirty years, and in a series of judgments contained in many volumes is to be found the basis of what is to-day the constitutional law of this country. Were it possible it would be inappropriate to follow here, with whatever profit, the processes by which this great work was done. The least approach to technical analysis would demand a statement of the successive questions as they arose, each fraught with the history of the time and each suggesting illustrations and analogies which subsequent time has developed. It may have been that could Marshall have foreseen the extent to which, in some instances, his conclusions could be carried, in the uncertain future and under such wholly changed circumstances as no man could then conjecture, he would possibly have qualified or limited their application; but the marvel is that of all he wrought in the field of constitutional labor there is so little that admits of even question.

But besides this there was much more. It has been truly said of him that he would have been a great judge at any time and in any country. Great in the sense in which Nottingham and Hardwicke as to equity were great; in which Mansfield as to commercial law and



Stowell as to admiralty were great — great in that, with little precedent to guide them, they produced a system with which the wisdom of succeeding generations has found little fault and has little changed. In Marshall's court there was little precedent by which to determine the rights of the Indian tribes over the land which had once been theirs, or their rights as nations against the States in which they dwelt; there was little precedent when, beyond the seas, the heat of war had produced the British Orders in Council and the retaliatory Berlin and Milan Decrees; when the conflicting rights of neutrals and belligerents, of captors and claimants, of those trading under the flag of peace and those privateering under letters of marque and reprisal; when the effect of the judgments of foreign tribunals; when the jurisdiction of the sovereign upon the high seas — when these and similar questions arose there was little precedent for their solution, and they had to be considered upon broad and general principles of jurisprudence, and the result has been a code for future time.

Passing from this, a word must be said as to his judicial conduct when sitting apart from his brethren in his Circuit Courts. Especially when presiding over trials by jury his best personal characteristics were shown. The dignity, maintained without effort, which forbade the possibility of unseemly difference, the quick comprehension, the unfailing patience, the prompt ruling, the serene impartiality, and, when required, the most absolute courage and independence, made up as nearly perfect a judge at Nisi Prius as the world has ever known.

One instance only can be noticed here. The story of Aaron Burr, with all its reality and all its romance, must always, spite of much that is repugnant, fascinate both young and old. When, in a phase of his varied life, he who had been noted, if not famous, as a soldier, as a lawyer, as an orator, who had won the reason of men and charmed the hearts of women, who had held the high office of Vice-President of the United States, and whose hands were red with the blood of Hamilton — when he found himself on trial for his life upon the charge of high treason, before a judge who was Hamilton's dear friend, and a jury chosen with difficulty from an excited people,

what wonder that, like Cain, he felt himself singled out from his fellows, and, coming between his counsel and the court, exclaimed: "Would to God that I did stand on the same ground with any other man." And yet the impartiality which marked the conduct of those trials was never excelled in history. By the law of our mother country to have only compassed and imagined the government's subversion was treason; but, according to our Constitution, "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort;" and can it be, said Marshall, that the landing of a few men, however desperate and however intent to overthrow the government of a State, was a levying of war? It might be a conspiracy, but it was not treason within the Constitution — and Burr's accomplices were discharged of their high crime. And upon his own memorable trial — that strange scene in which these men, the prisoner and the judge, each so striking in appearance, were confronted, and as people said, "two such pairs of eyes had never looked into one another before" — upon that trial the scales of justice were held with absolutely even hand. No greater display of judicial skill and judicial rectitude was ever witnessed. No more effective dignity ever added weight to judicial language. Outside the court and through the country it was cried that "the people of America demanded a conviction," and within it all the pressure which counsel dared to borrow was exerted to this end. It could hardly be passed by. "That this court dares not usurp power, is most true," began the last lines of Marshall's charge to the jury. "That this court dares not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace." That counsel should, he said, be impatient at any deliberation of the court, and suspect or fear the operation of motives to which alone

they could ascribe that deliberation, was perhaps a frailty incident to human nature, "but if any conduct could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regrets."

The result was acquittal, and as was said by the angry counsel for the Government, "Marshall has stepped in between Burr and death!" Though the disappointment was extreme, though starting from the level of excited popular feeling, it made its way upward till it reached the dignity of grave dissatisfaction expressed in a President's message to Congress, though the trial led to legislative alteration of the law, the judge was unmoved by criticism, no matter from what quarter, and was content to await the judgment of posterity that never, in all the dark history of State trials, was the law, as then it stood and bound both parties, ever interpreted, with more impartiality to the accuser and the accused.

Once only did Marshall enter the field of authorship. Washington had bequeathed all his papers, public and private, to his favorite nephew, who was one of Marshall's associates on the bench. It was agreed between them that Judge Washington should contribute the material and that Marshall should prepare the biography. The bulk of papers was enormous, and Marshall had just taken his seat on the bench and was deep in judicial work. The task was done under severe pressure, and ill health more than once interrupted it; but it was a labor of love, and his whole heart went out toward the subject. His political opponents feared that his strong convictions, which he never concealed, would now be turned to the account of his party, but the writer was as impartial as the judge. He recalled and perpetuated the intrigues and cabals, the disappointments and the griefs which, equally with the successes, were part of Washington's life; but full justice was done to those men whom both Washington and his biographer distrusted and opposed. It is agreed that for minuteness, impartiality and accuracy, the history is exceeded by none. There were those who said the work was colorless, and others were severe by reason of the

absolute truth which became their most absolute punishment, but no one's judgment was as severe as Marshall's own, save only as to its accuracy. Once only was this seriously questioned, and by one of the most distinguished of his opponents, and the result was complete vindication.

It is matter of history that upon Washington's death the House had resolved that a marble monument should be erected in the city of Washington, "so designed as to commemorate the great events of his military and political life." But, as Marshall tells us, "that those great events should be commemorated could not be pleasing to those who had condemned, and continued to condemn, the whole course of his administration." The resolution was postponed in the Senate and never passed, and almost the only tinge of bitterness in his pages is that those who possessed the ascendancy over the public sentiment employed their influence "to impress the idea that the only proper monument to a meritorious citizen was that which the people would erect in their affections." This he wrote in 1807 and repeated in 1832, and in the next year the people resolved that this should no longer be. The National Monument Association was then formed, and Marshall was its first president. Under its auspices, and with the aid, long after, of large appropriations by Congress, the gigantic column within our sight is slowly and gradually being reared.

Near the close of his life, when he was seventy-four years old, Marshall was chosen a member of the convention which met in 1829 to revise the Constitution of his native State. It was a remarkable body. The best men of the State were there. Some of them were among the best men in the country, for then, as always, Virginia had been proud to rear and send forth men whose names were foremost in their country's history. Prominent among them were Madison, Monroe and Marshall. Even then, party spirit ran high. Two questions in particular, the basis of representation and the tenure of judicial office, distracted the convention as they had distracted the people. On both these questions Marshall spoke with his accustomed dignity and not less than his accustomed force, and his words were listened to with reverent respect. Upon the subject of judicial tenure he spoke from



his very heart, "with the fervor and almost the authority of an apostle." He knew better than any, how a judge, standing between the powerful and the powerless, was bound to deal justice to both, and that to this end his own position should be beyond the reach of anything mortal. "The judicial department," said he, "comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience?" And his next words were fraught with the wisdom of past ages, let us hope not with prophetic foreboding: "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary."

Something has here been said of Marshall's inner life in its earlier years, and no man's life was ever more dear to those around him than was his from its beginning to its close. His singleness and simplicity of character, his simplicity of living, his love for the young and respect for the old, his deference to women, his courteous bearing, his tender charity, his reluctance to conceive offense and his readiness to forgive it, have become traditions from which in our memories of him we interweave all that we most look up to, with all that we take most nearly to our hearts.

As the evening of life cast its long shadows before him, the labor and sorrow that come with four-score years were not allowed to pass him by. Great physical suffering came to him; the hours not absorbed in work brought to him memories of her whose life had been one with his for fifty years. The "great simple heart too brave to be ashamed of tears," was too brave not to confess that rarely did he go through a night without shedding them for her. No outward trace of this betrayed itself, but lest some part of it should, all unconsciously to himself, impair his mental force, he begged those nearest to him to tell him in plain words when any signs of failing should appear. But the steady light within burned brightly to the last, however waning might be



his mortal strength. He met his end, not at his home, but surrounded by those most dear to him. As it drew near, he wrote the simple inscription to be placed upon his grave. His parentage, his marriage, with his birth and death, were all he wished it to contain. And as the long summer day faded, the life of this great and good man went out, and in the words of his Church's liturgy, he was "gathered to his fathers, having the testimony of a good conscience, in the communion of the catholic church, in the confidence of a certain faith, in the comfort of a reasonable, religious and holy hope, in favor with God, and in perfect charity with the world."

And for what in his life he did for us, let there be lasting memory. He and the men of his time have passed away; other generations have succeeded them, other phases of our country's growth have come and gone; other trials, greater a hundred fold than he or they could possibly have imagined, have jeopardized the nation's life; but still that which they wrought remains to us, secured by the same means, enforced by the same authority, dearer far for all that is passed, and holding together a great, a united and a happy people. And all largely because he whose figure is now before us has, above and beyond all others, taught the people of the United States, in words of absolute authority, what was the Constitution which they ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

Wherefore, with all gratitude, with fitting ceremony and circumstance; in the presence of the highest in the land, in the presence of those who make, of those who execute, and of those who interpret the laws; in the presence of those descendants in whose veins flows Marshall's blood, have the Bar and the Congress of the United States here set up this semblance of his living form, in perpetual memory of the honor, the reverence and the love which the people of his country bear to the great Chief Justice.

## VI.

### Resolutions of the Philadelphia Bar in 1831.

The following is from *Hazard's Pennsylvania Register*, for which we are indebted to Francis Rawle, Esq., of the Philadelphia Bar. We reproduce this interesting correspondence because it has not found its way into general current legal literature; shows the names of many of the great lawyers of that time in Philadelphia, and their reverence and regard for the Chief Justice; led to the painting of the Inman portrait, which appears among the illustrations of the present publication; and above all, for the sentiment which the Bar expressed, and which seemed especially grateful to the Chief Justice, "that neither he nor the Court had ever attempted to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required."

#### Respect to Chief Justice Marshall.

At a meeting of the Bar of Philadelphia, held in the Circuit Court Room on the 30th of September, 1831, William Rawle, Esq., was appointed chairman, and John Sergeant secretary.

The following resolution was unanimously adopted:

*Resolved*, That a committee be appointed to wait upon Chief Justice Marshall and express to him the reverence of the Bar for his pre-eminent character, talents and services, and request him to honor them with his company at dinner at such time as may be convenient to him.

The following members were appointed the committee, to wit:

WILLIAM RAWLE,  
JOHN SERGEANT,  
HORACE BINNEY,  
P. S. DUPONCEAU,

WM. H. TOD,  
R. PETERS,  
C. J. INGERSOLL,  
JOSIAH RANDALL,

GEO. M. DALLAS.

*Resolved*, That the Hon. Judge Hopkinson be requested to unite with the committee in carrying into effect the above resolution.

At an adjourned meeting at the same place on the first day of October, 1831, Mr. Rawle from the committee appointed yesterday, reported that the committee, together with Judge Hopkinson, who in compliance with the wishes of the Bar, united himself with them, had waited upon Chief Justice Marshall, and by their chairman communicated to him the resolution of the Bar, with the following address:

Sir: — The Bar of Philadelphia are much gratified by the opportunity which your visit to this city affords us of testifying the high respect and profound veneration for your character felt by us all.

We cannot but consider the whole nation indebted to one who for so long a series of years has illuminated its jurisprudence, and enforced with equal mildness and firmness its constitutional authority, who has never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required.

In respect to many of us, your exercise of the high office of Chief Justice of the Supreme Court was anterior to the commencement of their professional existence. With some, the recollection of your appointment revives the scene of the satisfaction that it gave; with all, there is a perfect conviction that the station never was or could be better filled.

It has been noticed with infinite gratitude to the great Dispenser of all earthly bounties that the hand of time, though it may affect the body, has not diminished those great powers by which the mind of the individual whom we address, has been so long, so eminently distinguished.

As a testimony of the sentiments we entertain, the Bar respectfully solicits the honor of your company to a dinner on any day you may think proper to name, agreeably to the following resolution this day adopted.

WILLIAM RAWLE,  
JOHN SERGEANT,  
HORACE BINNEY,  
PETER S. DUPONCEAU,  
W. H. TOD,  
GEO. M. DALLAS,  
CHARLES J. INGERSOLL,  
RICHARD PETERS,  
JOSIAH RANDALL.

To the Honorable JOHN MARSHALL,  
Chief Justice of the S. C., U. S.

To which Chief Justice Marshall made the following reply:

It is impossible for me, gentlemen, to do justice to the feelings with which I receive your very flattering address, nor shall I make the attempt; to have performed the official duties assigned to me by my country in such a manner as to acquire the approbation of so respectable and respected a Bar as that of Philadelphia, affords me the highest gratification of which I am capable, and is more than an ample reward for the labor which those duties impose. I dare not hope that my services or ability to continue them entitle me to the favorable sentiments which your kindness has expressed, but I shall always recollect the expression of them with a degree of pride and satisfaction which few occurrences of my life have inspired. Might I be permitted to claim for myself as well as for my associates any part of the liberal consideration your partial favor bestows it would be that we have never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.

My state of health does not permit me to indulge in the pleasures of society, and I know not how long I may continue an invalid.

I must therefore decline your polite invitation to dine with you, and entreat you to believe that in doing so, I

submit with infinite reluctance to a privation which I cannot avoid.

With great and respectful esteem, I am, gentlemen,  
Your obliged and obedient servant,

J. MARSHALL.

Mr. Rawle, from the same committee, reported the following resolutions, which were unanimously adopted:

*Resolved*, That the members of the Bar of Philadelphia will in a body wait on Chief Justice Marshall, and that he be requested to receive them in the United States Court-room at such a time as may suit his convenience; and that the chairman take the necessary steps to carry this resolution into effect.

*Resolved*, That the chairman at this meeting be requested to wait on Chief Justice Marshall and express to him the request of the Bar of Philadelphia that he will permit his portrait to be taken.

*Resolved*, That a committee be appointed to obtain the services of an eminent artist of this city to carry into execution the purpose of the foregoing resolution should Chief Justice Marshall assent thereunto.

*Resolved*, That these proceedings be published.



## VII.

### Address of the National Committee of the American Bar Association on John Marshall Day.<sup>1</sup>

NEW ORLEANS, February 4, 1900.

*To the Bench and Bar of the United States:*

By direction of the American Bar Association, a committee composed of one member from each State and Territory, and from the District of Columbia, has been appointed by the Association in reference to the proposed celebration of "John Marshall Day," to take place on Monday, February 4, 1901, being the first centennial of the installation of that eminent jurist as Chief Justice of the United States. A commemoration of this event, and of the splendid career of Marshall in the great office which he adorned for more than thirty-four years, cannot fail to be an occasion of profound interest and importance to the American bench and bar. Soldier, student, advocate, diplomatist, statesman and jurist — he was one of the finest types of American manhood in its best estate. His fame is the heritage of the nation, and it is befitting that the whole country should celebrate the appointed day.

In the language of Judge Story, when voicing the sentiments of the great court on the official announcement of Marshall's death, "his genius, his learning and his virtues have conferred an imperishable glory on his country, whose liberties he fought to secure, and whose institutions he labored to perpetuate. He was a patriot and a statesman of spotless integrity and consummate wisdom. The science of jurisprudence will forever acknowledge him as one of its greatest benefactors. The Constitution of the United States owes as much to him as to any single mind for the foundations on which it rests and the expositions by which it is to be maintained; but, above all, he was the ornament of human nature itself, in the beautiful illustration which his life con-

<sup>1</sup> See Introduction, vol. I, section II, p. xi.

stantly presented of its most attractive graces and most elevated attributes.

The committee has been charged with the duty of publishing this address to the legal profession of the United States: also, with the further duty of preparing suggestions for the observance of the day on the part of the State, city and county bar associations and other public bodies in the United States.

The committee was also charged with the duty of requesting the good offices of the President of the United States in recommending to Congress the propriety of observing "John Marshall Day" on the part of Congress and other departments of the Government of the United States, and of memorializing Congress to observe befitting ceremonies in honor of the great Chief Justice.

It is proposed that commemoration services be held at the National Capital, under the direction of the Supreme Court of the United States, with the aid and support of the co-ordinate branches of the government.

It is also expected that the day will be properly observed on the part of all State and National courts, by the cessation of judicial business, and that all State, city and county bar associations participate in proper exercises in such manner as to them shall seem most appropriate.

Similar ceremonies are recommended to be held in all American colleges, law schools and public schools, to the end that the youth of our country may be made more fully acquainted with Marshall's noble life and distinguished services.

The American Bar Association leaves the execution of this national celebration in the hands of the courts and the public bodies named, and the committee express the sincere hope that the celebration be national in its character and imposing in its extent and fervor, and that it may have the hearty support of the secular and legal press of our country.

The active co-operation of the respective Vice-Presidents and members of local councils appointed by the association, with the respective members of the National Committee, is respectfully requested and expected.

On behalf and by authority of the National Committee.

WILLIAM WIRT HOWE, Chairman.

ADOLPH MOSES, Secretary.

Committee on John Marshall Day.

Wm. Wirt Howe,	New Orleans, Louisiana. <i>Chairman.</i>
Thomas N. McClellan,	Montgomery, Alabama.
Everett E. Ellinwood,	Flagstaff, Arizona.
M. M. Cohn,	Little Rock, Arkansas.
D. L. Withington,	San Diego, California.
Hugh Butler,	Denver, Colorado.
Simeon E. Baldwin,	New Haven, Connecticut.
Anthony Higgins,	Wilmington, Delaware.
Henry E. Davis,	Washington, District of Columbia.
R. W. Williams,	Tallahassee, Florida.
Burton Smith,	Atlanta, Georgia.
William W. Woods,	Wallace, Idaho.
Adolph Moses,	Chicago, Illinois.
William A. Ketcham,	Indianapolis, Indiana.
J. W. McLoud,	South McAllister, Indian Territory.
A. J. McCrary,	Keokuk, Iowa.
John D. Milliken,	McPherson, Kansas.
William Lindsay,	Frankfort, Kentucky.
Charles F. Libby,	Portland, Maine.
John S. Wirt,	Elkton, Maryland.
M. F. Dickinson, Jr.,	Boston, Massachusetts.
William L. January,	Detroit, Michigan.
Hiram F. Stevens,	St. Paul, Minnesota.
R. H. Thompson,	Jackson, Mississippi.
Selden P. Spencer,	St. Louis, Missouri.
Wilbur F. Sanders,	Helena, Montana.
Carroll S. Montgomery,	Omaha, Nebraska.
Joseph W. Fellows,	Manchester, New Hampshire.
R. Wayne Parker,	Newark, New Jersey.
Henry L. Warren,	Albuquerque, New Mexico.
John S. Wise,	New York, New York.
John L. Bridgers,	Tarboro, North Carolina.
J. H. Bosard,	Grand Forks, North Dakota.
Henry C. Ranney,	Cleveland, Ohio.
Henry E. Asp,	Guthrie, Oklahoma.
Charles H. Carey,	Portland, Oregon.
S. P. Wolverton,	Sunbury, Pennsylvania.
Amasa M. Eaton,	Providence, Rhode Island.

**Committee on John Marshall Day — Continued.**

Geo. Lamb Buist,	Charleston, South Carolina.
Bartlett Tripp,	Yankton, South Dakota.
Ed. Baxter,	Nashville, Tennessee.
F. C. Dillard,	Sherman, Texas.
Richard B. Shepard,	Salt Lake City, Utah.
Jackson Guy,	Richmond, Virginia.
Elihu B. Taft,	Burlington, Vermont.
C. H. Hanford,	Seattle, Washington.
W. W. Van Winkle,	Parkersburg, West Virginia.
R. M. Bashford,	Madison, Wisconsin.
Nellis E. Corthell,	Laramie, Wyoming.

The report of this committee to the American Bar Association will be found in the official Report of that Association for 1899, pages 13, 489; for 1900, pages 8, 41, 414 and 439; and for 1901, pages 443-458, prepared by Mr. Adolph Moses, the last containing a summary of the celebrations throughout the United States on Marshall Day.





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